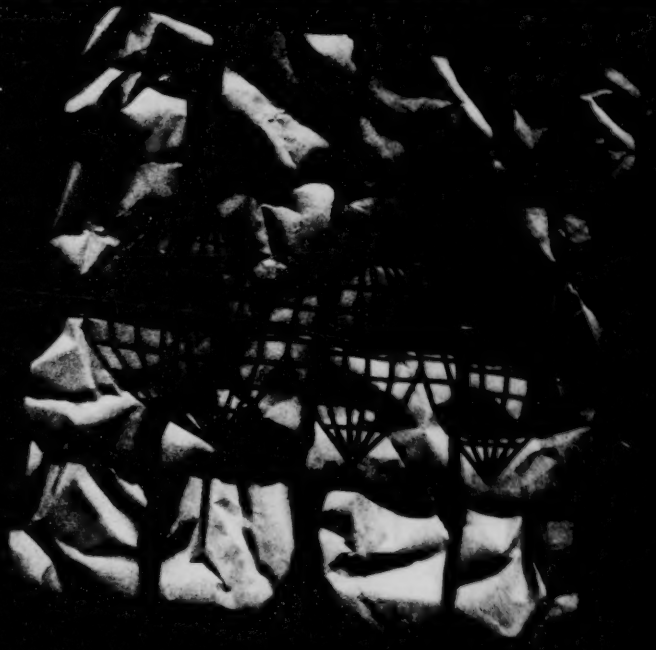
Human Rights and the Protection of Refugees under International Law



Proceedings of a conference held in Montreal
November 29–December 2, 1987

Edited by
Alan E. Nash

Rapporteur
John P. Humphrey

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Canadian Human Rights Foundation
Fondation canadienne des droits humains

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Foreword

The intense controversy that has surrounded the admission of refugees to Canada in recent years, and that led to new legislation being adopted in 1988, is not an isolated event. In fact it mirrors a much larger debate taking place in many other parts of the world. Thus, for example, across Western Europe, in the United States and in parts of Asia, many governments have introduced restrictive measures to control the flow of refugees into their countries.

This flurry of legislative activity has been both the cause and a response to a growing awareness of the problems and challenges that refugees pose. It is a recognition that these difficulties are not only mounting, but are also substantially different from those that existed in 1951 when the international community adopted the Convention Relating to the Status of Refugees.

Many elements characterize this new situation, but a number of principal features can be readily identified. The world's population of refugees has grown at an alarming rate in recent years, increasing over the last decade to a total of between 11 and 15 million – a total that strains the capacity of the international community to adapt. The increasing ease of transportation has made many more countries accessible to refugee flows and has turned many – to their alarm – from countries of resettlement to countries of first refuge. In addition, the increasing movement of people persecuted because they are

members of particular groups has put pressure on an international system that was originally built on the concept of individual refugee determination. Moreover, large flows of people fleeing phenomena such as natural disasters, external aggression or economic collapse have further strained that system's refugee definition. Finally, the growing tendency of asylum-seekers to leave safe refuge to seek permanent settlement elsewhere and for individuals falsely to claim refugee status in order to circumvent immigration controls has added to the pressures on the international community.

It is to this new situation that the international community and individual governments have sought to respond; the main focus of this book is the extent to which their assistance and responses are valid or appropriate.

In the papers that follow, authors discuss the nature and causes of the refugee problem; the international response and the limitations of the existing protection system; possible means of prevention and solution; and the specific problems of the Canadian experience. While the issues are complex and wide-ranging, all authors are in agreement that to resolve the difficulties they identified it will be necessary to seek new and improved international agreements, to attack the root causes of refugee movements and to develop more extensive methods of providing aid – in all forms – to refugees. Far better information is needed on the number and condition of the world's current refugee population, along with sensitive national policies toward their selection and admission. In each country any legitimate new policies on refugee admissions must reconcile international legal obligations to protect refugees and the human rights of refugees with the human rights of existing citizens. In the search for such a balance the rights of refugees are always vulnerable. However, as this book argues, the defence of these rights is integral to the protection of refugees.

This volume contains the proceedings of a conference on "Human Rights and the Protection of Refugees under International Law", held between Sunday, November 29 and Wednesday, December 2, 1987 in Montreal, and organized by the Canadian Human Rights Foundation.

The conference objectives were

- to contribute to discussion and encourage potential co-operation in the protection of refugees under international law;
- to assess the efficacy of the legal framework and of international mechanisms for providing assistance to refugees and others;
- to explore a variety of possible solutions and priorities for international action; and
- to examine Canada's international role and responsibility in alleviating the plight of refugees.

Among those participating were lawyers, judges, diplomats, representatives of the Office of the United Nations High Commissioner for Refugees, international human rights organizations, politicians, civil servants, government officials and other persons concerned with the plight of refugees.

It is the intention of these proceedings to preserve as much as possible of the flavour of this event and therefore the overall structure of the conference and the order of the various background papers, papers and speeches that were given at it have been retained. To that end, also, all papers and speeches – after editing and revisions by their authors – are presented in the language in which they were first delivered. While the papers and speeches were subject to light technical editing, no attempt was made to standardize their format, length, or reference systems. In keeping with the spirit of a volume of conference proceedings, the papers are reproduced in large part as written by the authors and were not subject to the usual external review process for Institute monographs.

The main themes and issues discussed at the conference are expertly reviewed and introduced by Professor John Humphrey in his rapporteur's introduction, specially prepared for this volume. The discussions that took place after each session have been summarized to capture the main points of debate, and two representative examples of the many workshop presentations that took place (those by Harker and Drüke-Bolewski) are also included to indicate the range of the conference's activities.

In organizing such conferences on contemporary issues, the Canadian Human Rights Foundation seeks to promote greater awareness and respect for human rights and fundamental freedoms in Canada. While providing platforms from which individuals can express their views freely, the Foundation as such never assumes partisan positions on political issues. Therefore the opinions expressed within this volume are those of the speakers and do not necessarily reflect the views of the organizers, Board of Directors or National Council of the Canadian Human Rights Foundation, or those of the Institute for Research on Public Policy.

The Institute undertook to edit and co-publish these conference proceedings as part of its broader research interest in immigration and refugee issues. The financial support of the Donner Canadian Foundation for this research program is gratefully acknowledged. In co-publishing this volume with the Canadian Human Rights Foundation, the Institute hopes to encourage further discussion of the problems faced by the world's refugees and by governments in attempting to tackle these difficulties. In these ways, the Institute

hopes these proceedings will contribute to an eventual resolution of the plight of refugees.

Noël Kinsella
President
Canadian Human Rights Foundation

Rod Dobell
President
The Institute for Research on Public Policy

Avant-propos

La vive controverse suscitée par l'admission de réfugiés au Canada depuis quelques années, qui a engendré l'adoption d'une nouvelle législation en 1988, n'est pas un fait isolé. Elle reflète en réalité le débat qui se tient à une beaucoup plus grande échelle dans bien d'autres contrées du monde. Ainsi, en Europe occidentale, aux États-Unis et dans certaines régions d'Asie, bien des gouvernements ont instauré certaines restrictions pour enrayer l'afflux de réfugiés dans leur pays.

Cette activité législative fébrile a été à la fois la cause et la conséquence d'une prise de conscience de plus en plus aiguë des problèmes et des défis que posent les réfugiés. C'est la belle preuve que non seulement les difficultés s'aggravent mais qu'elles sont aussi très différentes de celles qui se posaient en 1951, lorsque la convention internationale sur le statut des réfugiés fut adoptée.

Bien des éléments caractérisent cette nouvelle situation, mais on peut aisément identifier quelques traits principaux. La population mondiale de réfugiés augmente à un rythme alarmant depuis quelques années, puisqu'elle a atteint en une décennie un total de 11 à 15 millions, ce qui grève lourdement les facultés d'adaptation de la collectivité internationale. En raison des facilités de déplacement de plus en plus grandes, un beaucoup plus grand nombre de pays sont devenus accessibles aux réfugiés et bien des pays qui étaient des pays

d'établissement sont devenus, à leur grande inquiétude, des pays de premier refuge. Par ailleurs, l'instabilité croissante de groupes persécutés met à rude épreuve un système international conçu à l'origine pour examiner les demandes individuelles d'accès au statut de réfugié; le nombre de personnes prenant la fuite devant des phénomènes comme les catastrophes naturelles, l'agression extérieure ou l'effondrement économique grève aussi lourdement ce système. Enfin, la tendance croissante des personnes en quête d'un asile à quitter un refuge sûr pour s'établir définitivement ailleurs et l'augmentation du nombre de personnes demandant le statut de réfugié pour contourner les formalités d'immigration ont accentué les pressions exercées sur la collectivité internationale.

C'est à cette nouvelle situation que la collectivité internationale et les gouvernements essaient de faire face; l'objectif principal du présent ouvrage est de voir si leur aide et leurs réactions portent leurs fruits ou si elles sont pertinentes.

Dans les documents qui suivent, les auteurs exposent la nature et les causes du problème des réfugiés; la réaction internationale et les limites du système de protection actuel; les possibilités de prévention et de solutions ainsi que les problèmes rencontrés au Canada en particulier. Si les sujets sont compliqués et variés, tous les auteurs s'accordent à dire que pour surmonter les difficultés, il sera nécessaire de conclure de nouveaux accords internationaux mieux adaptés aux besoins, afin de s'attaquer aux racines du problème des mouvements de réfugiés et de mettre au point une batterie plus élaborée de méthodes d'aide – sous toutes ses formes – aux réfugiés. Il faut des informations bien plus précises sur le nombre et l'état de la population mondiale actuelle de réfugiés et des politiques nationales de sélection et d'admission appropriées. Dans chaque pays les nouvelles politiques légitimes d'admission de réfugiés doivent concilier les obligations juridiques internationales visant à protéger les réfugiés et leurs droits avec les droits des citoyens en place. Dans la recherche d'un tel équilibre, les droits des réfugiés sont toujours vulnérables. Comme le disent les auteurs de cet ouvrage, la défense de ces droits fait toutefois partie intégrante de la protection des réfugiés.

Le présent volume renferme le texte des délibérations d'une conférence sur "La protection des réfugiés en droit international" qui s'est tenue du dimanche 29 novembre au mercredi 2 décembre 1987 à Montréal, sous les auspices de la Fondation canadienne des droits humains.

Les objectifs de la conférence consistaient à:

- alimenter la discussion et encourager la coopération pour la protection des réfugiés en droit international;

- évaluer l'efficacité du cadre juridique et des mécanismes internationaux en matière d'aide aux réfugiés et à d'autres personnes;
- examiner en profondeur toute une série de solutions et de priorités pour une intervention internationale; et
- examiner le rôle que devrait jouer le Canada et la responsabilité qu'il a sur le plan international pour faciliter la vie aux réfugiés.

Parmi les participants, il y avait des avocats, des juges, des diplomates, des représentants du bureau du Haut Commissariat des Nations Unies pour les réfugiés, d'organismes internationaux voués à la défense des droits de l'homme, des politiciens, des fonctionnaires, des dignitaires de différents gouvernements et d'autres personnes se préoccupant du sort des réfugiés.

Dans cet ouvrage, nous nous sommes efforcés de préserver autant que possible le climat de cette conférence et partant son organisation générale ainsi que l'ordre dans lequel les différents documents et discours ont été présentés. Pour cette raison – tous les documents et discours – qui ont été vérifiés et révisés par leur auteur – sont publiés dans la langue dans laquelle ils ont été présentés. Les documents et les discours ont fait l'objet de légers remaniements techniques, mais nous n'avons pas essayé d'en normaliser la présentation, la longueur ni le système de références. Selon la pratique courante pour les délibérations d'une conférence, les documents sont reproduits en grande partie tels qu'ils ont été rédigés par leur auteur et ils n'ont pas été révisés comme on le fait d'habitude pour les monographies publiées par l'Institut.

Les principaux thèmes et sujets abordés à la conférence sont présentés de main de maître par le professeur John Humphrey dans l'introduction qu'il a préparée tout spécialement pour ce volume à titre de rapporteur. Les discussions qui ont eu lieu à la fin de chaque séance ont été soigneusement résumées afin de rendre les principaux éléments du débat; deux exemples représentatifs des nombreux exposés faits en atelier (ceux de John Harker et de Luise Drüke-Bolewski) sont également inclus afin de donner une idée du large éventail des activités dans le cadre de la conférence.

En organisant de telles conférences sur des questions d'actualité, la Fondation canadienne des droits humains essaie de promouvoir la prise de conscience des droits de l'homme et des libertés fondamentales et leur respect au Canada. Si elle offre à certaines personnes la possibilité d'exprimer librement leurs opinions, la Fondation n'adopte jamais de prise de position sur des questions d'ordre politique. Aussi, les opinions exprimées dans le présent volume n'engagent que leur auteur et elles ne reflètent pas nécessairement celles des organisateurs, du conseil d'administration

ni du Conseil national de la Fondation canadienne des droits humains ni celles de l'Institut de recherches politiques.

L'Institut a décidé de vérifier et de publier les délibérations de la conférence dans le cadre de ses recherches générales sur l'immigration et les problèmes relatifs aux réfugiés. Nous tenons à remercier la Fondation canadienne Donner pour l'aide financière qu'elle nous a apportée dans cette tâche. En publiant le présent volume en collaboration avec la Fondation canadienne des droits humains, l'Institut espère favoriser le débat sur les problèmes que connaissent les réfugiés du monde et les gouvernements qui essaient de les aider. L'Institut espère ainsi que ces délibérations contribueront à trouver une solution à la situation dramatique des réfugiés.

Noël Kinsella
Président
Fondation canadienne des droits humains

Rod Dobell
Président
Institut de recherches politiques

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The Institute for Research on Public Policy is grateful to the many people who helped in the production of this book, especially Kathryn Randle for professional technical editing services and René Delvaux for translation. Institute staff have been tireless in their support of this project, and special thanks are owed to Leigh McGowan who provided invaluable administrative and word processing help; Maureen Tamarit for her assistance; and Parker Staples, Ruby Day and Donna McCafferty who have overseen final production and printing.

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Rapporteur's Introduction

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The problem of refugees and how to deal with them is as old as man's presence on Earth. We know from the Old Testament something about the exodus of the Jews from Egypt. An example nearer to our time was the arrival in Canada, after the American War of Independence, of the United Empire Loyalists who, having preferred George III to George Washington, had to leave the United States and seek refuge elsewhere. But it was only after World War I that the international community began to take effective steps to come to the assistance of refugees when more than a million and a half Russian refugees sought relief in various countries of asylum. Other refugees came to neighbouring countries from Asia Minor, Thrace and Bulgaria. Some refugees were returned to their countries of origin under treaties of exchange, including the Greco-Turkish and Greco-Bulgarian treaties, that did not always respect the wishes of the people involved. Others agreed to repatriation.

The League of Nations played an important role in these developments. It also provided legal protection and travel documents that were recognized by many countries. A year after the death of

* The author was Executive Secretary of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

Fridjof Nansen (a great name in the history of the protection of refugees), the League created the Nansen International Office for Refugees. This Office was concerned mostly with the legal protection of refugees and the co-ordination of the relief work of private organizations.

During World War II, the United Nations Relief and Rehabilitation Administration (UNRRA) was created. It was concerned chiefly with the repatriation of the millions of refugees displaced by the Nazi and Fascist regimes and the consequences of war. It was not authorized to resettle displaced persons or to deal with refugees as such.[1] After the war, UNRRA was replaced by the International Refugee Organization (IRO) which, between 1947 and 1951, assisted more than 1.5 million refugees and displaced persons in camps in Europe for varying periods of time by providing vocational training, food and clothing.

In 1951, a Convention Relating to the Status of Refugees was adopted by a conference of plenipotentiaries[2] that had been convened by the United Nations. The Convention was concerned primarily with the treatment that should be given to refugees (as defined by the instrument) by ratifying states once the latter had granted asylum to the refugees. It did not grant any right of asylum, but by its article 33, it was agreed that "no contracting state shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

Adopting a personalized approach, the Convention defined refugees, as will be seen, as including persons who, owing to well-founded fear of being persecuted for stated reasons and outside the country of their former nationality or habitual residence, are unable or unwilling to return to it. By March 1, 1988, the Convention had been ratified by 100 states. A protocol to this Convention was adopted in 1966. In 1954, a Convention Relating to the Status of Stateless Persons was also adopted; and in 1961, another was adopted on the reduction of statelessness.

In 1950, the United Nations General Assembly adopted the Statute of the Office of the United Nations High Commissioner for Refugees, the stated purpose of which was to provide "the necessary legal protection for refugees". The Office's chief purpose is now to provide material assistance to refugees and to help their repatriation or resettlement. Finally, in 1967, the General Assembly adopted its Declaration on Territorial Asylum. Like the 1951 Convention, this Declaration does not recognize any legal right to asylum. But it does prohibit *refoulement*. Reference should also be made to the definition of refugees in the 1969 Convention of the Organization of African

Unity, a regional body, which adds to the criteria for eligibility such factors as external aggression, occupation, foreign domination and events seriously disturbing public order.

Whereas in the period between the two world wars and in the years immediately thereafter international law was concerned chiefly with European refugees, the greatest problems are now in Africa and Asia. It was in 1957 that the General Assembly first authorized the High Commissioner to assist refugees who did not come fully within the 1951 Convention definition. The case involved large numbers of mainland Chinese refugees in Hong Kong.[3]

So much, even although very briefly, for the history of the problem. Since this is a book on refugees, and especially because the whole question has become controversial in Canada, it will perhaps be appropriate now to address the question of definition. What is a refugee? Broadly defined and in everyday language, a refugee is any person who is seeking refuge, that is to say, shelter from pursuit or danger. Asylum, which is what the refugee is usually seeking, is a place of safety. And the danger from which he is fleeing can be of many kinds, including famine or poverty.[4]

If the world were a single state in which there was complete freedom of movement, refugees, whatever the danger they were fleeing from, would have the legal right, whatever the reality might be, to flee to and find asylum in any place of safety. But the world is not a single state, and the separate 'sovereign' states that make up the international community do not recognize any legal right to asylum. There is no such thing as freedom of movement at the international level. The most that can be said is that states have the right in international law to grant asylum when they want to. But they are under no legal obligation to do so. There is indeed no more jealously guarded right of states than their legal right to determine who shall be admitted to their territory.

This is why Article 13 of the Universal Declaration of Human Rights says only that "everyone has the right to freedom of movement and residence within the borders of each state" and that "everyone has the right to leave any country, including his own, and to return to his country". The article recognizes no right of foreigners to enter any country other than their own. It follows that, whatever the circumstances, the right of an asylum-seeker to enter a country of asylum will depend upon the law of that country. It is true that this country may be bound by treaty to give certain rights to refugees. The 1951 Convention does this. But, as already indicated, it does not recognize any right to asylum; and the same is true of the 1967 UN Declaration on Territorial Asylum. At the most, these instruments prohibit what they identify as *refoulement*.

It is also true that Article 14 of the Universal Declaration (which is now part of the customary laws of nations and therefore binding on all states) says that "everyone has the right to seek and to enjoy in other countries asylum from persecution". Whether Canada has the right under international law to arrest ships on the high seas that are bringing asylum-seekers to Canada is therefore doubtful. Since refugees have a right to seek asylum, a broader question, of which this is only a part, arises as to the extent to which states, whether they are parties to the 1951 Convention or not, must provide adequate opportunities for asylum-seekers to show that they have the right, under their law, to be granted asylum. What judicial and other facilities must Canadian laws provide for the purpose? It may well be that the Universal Declaration gives more protection to asylum-seekers than does the 1951 Convention.

Since general international law gives no right to asylum, any international obligations that states may have in the matter must result from some treaty or treaties to which they are parties. Such a treaty is the 1951 Convention. This treaty determines the treatment that must be extended to 'Convention refugees' once asylum has been granted under the law of the host state. Much of the Convention is directed to the prevention of discrimination against refugees.

In a long and complicated first article, the 1951 Convention defines the term refugee for the purposes of the Convention.[5] Included are all those persons who are recognized as refugees in a series of named international arrangements and conventions in force before 1951 and any person who "as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". An optional provision also permitted contracting states, on ratification of the instrument, to limit their obligations to cases resulting from "events occurring in Europe". This definition was modified, for those states that ratify it, by a Protocol in 1966 by which the words "as a result of events occurring before 1 January 1951" and the words "as a result of such events" are omitted. The Protocol also provides that the Convention shall be applied by the states parties without geographic limitation. It will be noted that the Convention definition is essentially political, in that it covers only persons with "a well-founded fear of being persecuted" for stated reasons. It does not cover so-called economic refugees or even persons fleeing from famine or other natural disasters.

One reason why this definition is important is because it has been incorporated into much national law, including Canadian law.[6] Whether an asylum-seeker will be admitted to a country of asylum depends in the last analysis on the law of that country. The current controversy in Canada as to who are real refugees and whether they should be admitted to the country could therefore be resolved by the Parliament of Canada and the provincial legislatures, which theoretically could decide that all asylum-seekers, whether political, economic or other, have a right to enter the country. But as long as Canadian law recognizes the criteria of the 1951 Convention and 1966 Protocol, only persons with a "well-founded fear of being persecuted" as stated in the Convention have such a right in Canadian law.

It should be obvious that, while this personal identification of refugees may be appropriate for a country like Canada which is far removed geographically from the sources of refugee movements, it is not appropriate and cannot work where great masses of asylum-seekers present themselves at borders. In the latter case, there must be some criteria of group eligibility.

Other matters of policy arise; but most, if not all of them will be determined not by the law relating to refugees, but rather by reference to the law relating to immigrants. Does the country need more immigrants and of what kind? How about such questions, therefore, as the attitude of trade unions or the unemployment rate? Would greater numbers of immigrants improve the economic prospects of the receiving country? And how about considerations of demography? Has a country the moral right to protect its demographic character? The Catholic philosopher, Jacques Maritain, has said that it has. Or should humanitarian considerations prevail? But, as already indicated, all these are questions of immigration policy, which are distinct from refugee law as governed by the criteria laid down in the 1951 Convention.

Notes

1. G. Goodwin-Gill, *The Refugee in International Law* (Oxford: 1983), p. 4, note 4.

2. Of which the author of this introduction was the executive secretary.

3. See Goodwin-Gill, *op. cit.*, p. 7.

4. See Article 33 of the 1951 Convention.

5. On the definition of refugees, see Goodwin-Gill, *op. cit.*, p. 1 *et seq.*

6. Canada adopted the Convention in its 1976 Immigration Act.

Conference Proceedings

I.
Keynote Address

La question des réfugiés : le temps est venu de proposer une solution à l'échelle mondiale

L'honorable Benoît Bouchard, C.P., député
Ministre de l'Emploi et de
l'Immigration Canada

Au cours des prochains jours, vous vous pencherez sur des questions complexes, difficiles et de portée globale. Plus important, vous chercherez des solutions : des solutions pour aider des gens – des gens dans des situations désespérées.

Au cours de cette conférence, on examinera le droit international et le rôle des institutions internationales relativement au problème des réfugiés. Il s'agit pour nous tous d'une question d'actualité, et je suis heureux de constater qu'elle sera étudiée ici dans le cadre d'une conférence organisée avec l'aide du Canada.

Le fait de fuir le danger et la persécution est non seulement une tragédie humaine, mais aussi un problème de plus en plus pressant et important. Les conventions et protocoles conçus pour protéger les réfugiés remplissent difficilement leur rôle. Les organisations humanitaires doivent affronter des phénomènes qui n'avaient pas été envisagés il y a trente ans. Il s'agit d'un problème en évolution – qui, pour être résolu, nécessite une évolution du droit et des organisations à l'échelle internationale. Le Canada constitue un bon endroit où entreprendre cette tâche.

Vous trouverez au Canada – en fait, ici même à Montréal – des milliers de Canadiens dont les parents sont venus au Canada comme réfugiés ou qui étaient eux-mêmes réfugiés. Il s'agit de personnes déplacées au cours de la seconde guerre mondiale, de réfugiés venus de

l'Ouganda au début des années 1970, de réfugiés indochinois dont plus de 100 000 ont été admis de 1975 à 1985, de milliers de réfugiés de l'Amérique Centrale et de l'Amérique du Sud réétablis au Canada dans le cadre de mesures spéciales.... L'an dernier, nous avons facilité le réétablissement de 17 000 réfugiés au Canada.

Les Canadiens se sont engagés à aider les réfugiés. Grâce au programme de parrainage du gouvernement et au dévouement de milliers de parrains du secteur privé, nous perpétuons une tradition humanitaire. Le gouvernement actuel se soucie également du sort des réfugiés après arrivée – des millions de dollars sont consacrés chaque année pour faciliter leur réétablissement et leur offrir des cours de langue.

La question des réfugiés, que nous nous employons tous a résoudre, est devenue à la fois plus importante et plus complexe et ce, de nombreuses façons.

Premièrement, le nombre constitue à lui seul un problème. Depuis la seconde guerre mondiale, les mouvements de réfugiés n'ont cessé de se succéder. En outre, ces mouvements ne se mesurent plus seulement en dizaines ou centaines de milliers d'individus comme en Indochine, en Amérique Latine ou au Moyen-Orient, mais en millions comme en Afghanistan. Personne ne connaît aujourd'hui de façon certaine le nombre de réfugiés dans le monde. J'ai vu des chiffres estimatifs qui allaient de 10 à 15 millions. En outre, nous savons que plus de 100 millions de personnes sont sans abri.

Deuxièmement, les problèmes sont devenus plus épineux. Plus que jamais, les vagues de réfugiés se composent de personnes définitivement déracinées et dispersées, et qui ne pourront jamais rentrer chez elles.

Troisièmement, il y a la recherche de solutions – solutions qui vont au-dela d'une réponse aux besoins immédiats de protection et d'aide des réfugiés, solutions qui permettent l'intégration ou la réintégration des réfugiés dans une société dont ils peuvent devenir des membres productifs plutôt que d'être condamnés à demeurer bénéficiaires de l'aide internationale.

Quatrièmement, de plus en plus se pose le problème de ce que les oganisations vouées à la cause des réfugiés appellent dans leur jargon des "mouvements irréguliers" – soit les déplacements imprévus de réfugiés qui bénéficient déjà d'une protection légale ou de fait, déplacements non autorisés par le pays de départ ou d'arrivée.

Cinquièmement, les tendances migratoires dan le monde sont en train de changer. Pour simplifier les choses, disons que plus de gens parcourent de plus grandes distances plus fréquemment sur toute la planète à la recherche de meilleures conditions économiques. Même si tous nous éprouvons de la compassion pour ces personnes qui cherchent à améliorer leur niveau de vie, il n'en demeure pas moins

que les migrants économiques qui veulent se prévaloir des mesures que nous prévoyons pour les réfugiés au sens de la convention *menacent* le processus de détermination du statut de réfugié.

Nous devons nous pencher sur les problèmes des deux groupes; cependant, nous nous préoccupons d'abord de celui dont les besoins sont plus pressants. Le mandat du haut commissariat des Nations unies pour les réfugiés définit clairement les réfugiés, et à juste titre, comme étant ceux qui ont les besoins les plus grands.

En fait, bon nombre des personnes appartenant aux groupes les plus nombreux sont pressées de trouver une nouvelle patrie – cependant, leur motif est différent : améliorer leur niveau de vie. Le monde entier doit faire face à cette réalité qu'est la migration globale.

Il s'agit d'un problème qui ne fait pas partie de l'ordre du jour de cette conférence, mais il est clair qu'il influera sur le cours de toutes vos délibérations.

Enfin, il y a la répartition inégale du fardeau de l'aide aux réfugiés étant donné que les demandeurs d'asile se retrouvent surtout dans les pays voisins de ceux d'où viennent des réfugiés. Situés surtout dans le tiers monde, ces pays éprouvent des problèmes de développement. Comme ils ne peuvent répondre aux besoins de leurs propres citoyens, ils peuvent encore moins absorber un grand nombre de nouveaux arrivants.

Parmi les pays industrialisés, de 15 à 20 fournissent de l'aide aux réfugiés. Les effets de cette aide et la réponse de chacun varient. Au Canada, nous croyons que ces problèmes ont une dimension mondiale. En qualité de citoyens du monde, nous devons contribuer à trouver des solutions.

Toutefois, afin de mettre en oeuvre des solutions, nous devons comprendre le problème. Qui essayons-nous d'aider? Où sont-ils? Combien sont-ils? Comment pouvons-nous le mieux les aider?

Nous savons tous combien il est difficile d'établir une définition. Le mandat du haut commissariat des Nations unies pour les réfugiés vise des millions de personnes, mais il peut en exclure un bon nombre qui sont dans des situations désespérées semblables à celles des réfugiés. Ces personnes ne répondent peut-être pas exactement à la description précise d'une personne fuyant la persécution. Il peut s'agir de personnes déplacées à l'intérieur d'un pays en raison de la guerre, de personnes qui fuient les atrocités de la guerre civile. Ces personnes doivent être aidées, sinon protégées.

On a proposé deux approches possibles. Dans un cas, il s'agit d'élargir la définition des conventions internationales pour que soient considérées comme réfugiées les personnes déplacées contre leur gré et qui répondent à une définition plus large que celle de la Convention de 1951 et du protocole s'y rattachant.

L'autre approche consisterait à délaisser la notion d'obligations légales internationales en faveur d'une forme de gestion de crise à l'échelle internationale – d'abord pour empêcher, dans toute la mesure du possible, que de telles crises se produisent et pour mettre en place, dans les cas de celles qui seraient inévitables, des programmes d'aide adaptés et complets.

Nous favorisons la seconde approche. Permettez-moi de vous expliquer les raisons de ce choix. À notre avis, il est *absolument indispensable* de faire une distinction entre le cas du migrant économique et celui du réfugié. Toute confusion entre les deux se répercute au coeur même du processus.

La volonté d'une nation d'accueillir des réfugiés à bras ouverts dans un nouveau foyer national naît d'abord dans le coeur et l'esprit de chacun. Ce processus s'amorce lorsqu'il devient clair que le sort des réfugiés est exceptionnel, qu'il s'agit de personnes dans une situation particulièrement épouvantable, de personnes réellement en danger.

Si notre pensée ne suit pas un tel cheminement, nous déformons la perception de la souffrance et du besoin, qui est l'élément psychologique fondamental pour maintenir et accroître l'appui du public qui est essentiel si nous voulons mieux aider les réfugiés.

Il est essentiel que les gens comprennent que, lorque nous affirmons que les réfugiés sollicitent notre aide, ils connaissent exactement la signification de ce terme. Nous devons protéger le sens de ce mot comme s'il s'agissait en soi d'une ressource internationale importante et précieuse. Car c'est exactement ce dont il s'agit.

Comme d'autres nations, nous devons, au Canada, faire face à ces réalités. Cette année, quelque 25 000 personnes auront revendiqué le statut de réfugié après leur arrivée dans notre pays. Si on ajoute ce nombre à celui des 19 000 personnes déjà inscrites, on obtient un total de 44 000 personnes dont le cas est à une étape ou l'autre de l'étude des demandes. Par expérience, nous savons que 70 % de ces revendications seront présentées par des personnes qui, en fait, sont des migrants économiques.

Depuis a peu près un an, nous avons dû nous occuper de deux incidents ayant fait l'objet de beaucoup de publicité et concernant des arrivées irrégulières sur nos rives. Ces incidents ont montré que l'appui du public à l'aide aux réfugiés et aux immigrants pouvait facilement s'atténuer. Il existe des mythes bien enracinés qui peuvent aboutir à une polarisation des idées dont on se passerait volontiers.

Peu importe ce qu'on peut en dire, je pense que le peuple qui constitue cette nation d'immigrants à une fière tradition de tolérance et de compassion. Les Canadiens sont en faveur d'un programme d'immigration ordonné et bien géré. Et les Canadiens veulent que nous continuions de réserver une place privilégiée aux réfugiés. Nous préservons et renforçons un tel appui par de l'information, de

l'éducation et une bonne gestion des programmes en insistant toujours sur le fait que *nous répondons à un véritable besoin*.

Malheureusement, on s'est de plus en plus rendu compte que bon nombre de revendicateurs du statut de réfugié essayaient tout simplement d'entrer au Canada par la "porte arrière". Ainsi, le point d'intérêt à changé : il ne s'agit plus de savoir si le Canada répond à des besoins, mais dans quelle mesure on abuse des traditions humanitaires et d'équité du Canada. Afin que le public continue d'appuyer l'aide aux réfugiés, nous devons éviter que cette impression d'abus ne se répande. Autrement, cela pourra nuire non seulement aux réfugiés, mais aussi aux immigrants.

Il nous faut tirer des leçons de ce genre de réactions négatives qui se sont manifestées dans d'autres pays—et veiller à ce qu'elles ne se produisent pas ici. À moins que l'on juge que la politique d'immigration et de détermination du statut de réfugié est appliquée d'une façon efficace, notre capacité d'éduquer et, partant, de susciter l'appui du public à la cause des réfugiés sera entravée dans la mesure où cette impression d'abus persistera.

Nous nous sommes engagés à préserver et à renforcer non seulement l'appui, mais aussi les initiatives du gouvernement et de la population canadienne en faveur des réfugiés. Voilà le principe dont sont inspirées toutes nos actions.

Par ailleurs, le Canada, ou, en fait, n'importe quel autre pays, ne peut seul répondre aux besoins des réfugiés du monde entier.

Il s'agit d'une question globale. À laquelle il faut une réponse à l'échelle mondiale. La solution à plusieurs problèmes doit être trouvée dans un esprit de collaboration. Il nous faut répartir le fardeau plus équitablement. Il nous faudrait être en mesure de réagir d'une façon planifiée et systématique à chaque nouveau mouvement plutôt que de laisser la chance ou la proximité géographique déterminer le pays d'accueil. Il nous faut avant tout changer notre approche à l'égard de ce vaste problème humain persistant en laissant de côté les *programmes spéciaux* pour adopter des solutions qui ne seront pas uniquement valables pour un an ou deux, mais en permanence.

Tous les problèmes ne peuvent cependant pas être réglés. Même avec des mécanismes et des mesures planifiés, nous ne pourrions pas prévoir un nouvel événement tragique avant qu'il ne se produise. Nous ne pourrions connaître à l'avance la taille et la composition du prochain exode.

Néanmoins, nous aurions des définitions et des principes communs pour nous guider. Nous ne serions plus obligés de réagir chaque fois par des mesures d'urgence. Il y aurait moins d'incompréhension, et on ferait davantage confiance au processus.

Toutes les ressources disponibles dans le monde – et rappelons-nous qu'elles sont limitées – seraient mieux utilisées.

Comment pouvons-nous arriver à ce genre de collaboration? Nous croyons, comme je l'ai déjà dit, qu'il nous faut agir dans le cadre des organisations internationales actuelles. Il ne suffit pas de nous tourner vers la convention des Nations unies et de dire "voilà la réponse". Il ne s'agit pas en soi d'une réponse.

Il faudrait considérer la convention pour ce qu'elle est – soit une étape importante au cours d'un long cheminement. De fait, cette convention oblige les pays signataires à s'acquitter de certaines obligations à l'égard des réfugiés. Toutefois, elle met l'accent sur les besoins immédiats en matière de protection – protection qui est si souvent obtenue dans les pays de premier asile.

Même si chaque pays du monde signait la convention et respectait ses engagements, il y aurait encore des problèmes. Il existe chez les réfugiés une deuxième série de besoins à combler – besoins à long terme et complexes. Ces problèmes ne se règlent pas simplement d'eux-mêmes.

Il existe aussi un autre problème auquel une solution ne pourra être trouvée que grâce à une collaboration internationale, soit l'effet des mouvements de réfugiés sur les pays de premier asile et sur les pays de réétablissement.

Nous pouvons aider les pays de premier asile en acceptant de réétablir des personnes et en partageant le fardeau pour permettre aux états voisins de maintenir leur politique de porte ouverte.

À certaines questions auxquelles nous nous heurtons, il est possible de trouver des réponses uniquement si la communauté internationale agit d'une façon concertée. À cette fin, les organisations internationales doivent jouer un rôle de chef de file. En réunissant les gens, comme nous l'avons fait pour cette conférence, nous pouvons proposer des solutions, comparer nos expériences et présenter de nouvelles perspectives. De cette manière, nous pouvons faire réellement avancer la cause des réfugiés.

Les mouvements de réfugiés – personnes isolées, déracinées, à la recherche d'une nouvelle patrie, d'un nouveau milieu social stable – sont aujourd'hui un phénomène commun. La question des réfugiés est une tragédie de notre monde moderne en proie aux soulèvements, aux tensions, aux incertitudes et aux inégalités.

La solution à tous ces problèmes n'est pas uniquement l'exil. Cette solution ne se trouve pas en fin de compte uniquement dans les pays de premier ou de second asile. Elle consiste à supprimer les *causes* mêmes des exodes. Elle exige une action à l'échelle mondiale pour prévoir et pour essayer de prévenir les crises.

Comme il s'agit d'un problème international, je suis heureux de la tenue de cette conférence qui facilitera la compréhension. Je suis

heureux que cette conférence se tienne ici même au Canada, une nation qui s'est engagée à aider les réfugiés. Et comme nous essayons de secourir des *personnes* en détresse – je suis heureux de vous voir, vous, les gens dévoués qui contribuent à la recherche de solutions.

J'espère, au cours des prochains jours, pouvoir prendre connaissance de vos délibérations.

Lorsque j'ai rencontré M. Hocké, nous avons discuté de la nécessité d'idées nouvelles, de collaboration, de leadership et d'engagement. Je crois que vous apportez une contribution dans chacun de ces domaines, dans chacun de vos pays. J'espère enfin que cette conférence nous motivera tous davantage pour le plus grand bénéfice de tous les réfugiés à travers le monde.

The Refugee Challenge: Time for a World Response

The Honourable Benoît Bouchard, P.C., M.P.
Minister of Employment and Immigration Canada

Over the next several days you will be discussing issues that are complex, difficult and global in scale. Most important you will be seeking solutions: solutions to help people in dire circumstances.

This conference will be examining international law and the role of international institutions in the context of the problem of refugees. This is a timely issue for all of us and I am glad to see it examined in Canada with Canadian sponsorship.

The human tragedy of flight from danger and persecution is urgent and increasing. The conventions and protocols designed to protect refugees are strained. Humanitarian institutions are being assailed by phenomena not foreseen 30 years ago. It is a changing problem – and international law and structures must evolve to meet it. Canada is a good setting in which to take up that task.

You will find in this country – indeed in this city – tens of thousands of Canadians whose parents arrived, or who themselves arrived, as refugees. They include people displaced by the Second World War. They include refugees from Uganda who arrived in the early 1970s. They include some of the more than 100,000 Indochinese refugees who arrived here between 1975 and 1985. They include thousands of refugees from Central and South America brought to Canada under special measures. Last year we settled 17,000 refugees in Canada.

Canadians are committed to helping refugees. Through government sponsorship and the individual dedication of thousands of private sponsors, we maintain a compassionate tradition. This government also cares about what happens to refugees once they arrive – millions of dollars are spent each year in resettlement assistance and language training. The challenge we all face has become larger and more complicated in many ways.

First there is the matter of sheer size. Since World War II one refugee wave has followed another. And these have been measured not only in the tens of thousands and hundreds of thousands as in Indochina, Latin America and the Middle East, but in the millions as in Afghanistan. No one knows for certain how many people are refugees today. I have seen estimates ranging from 10 million to 15 million. Beyond this, we know that more than 100 million people are homeless.

Second, the problems have become more tenacious. More than ever these waves are made up of the permanently uprooted and dispersed – people who can never go home. A third is the search for solutions – solutions that go beyond the immediate needs of the refugee for protection and assistance. Solutions that enable integration or re-integration of the refugee into a society where they can function as productive individuals rather than being condemned to being recipients of international welfare.

Fourth, there is the growing problem of what the technical literature of refugee organizations call "irregular movements" – the spontaneous flight of refugees who already have legal or *de facto* protection not sanctioned by the countries they are leaving or their destinations. Fifth, there is the shift in world immigration patterns. To oversimplify – more people are moving greater distances, more often, all across the globe in search of better economic conditions. While all of us are sympathetic to the desire for people to improve their economic status: economic migrants who seek to use the channels we provide for Convention refugees *threaten* the refugee process.

We need to deal with both groups, but our first concern remains those in the greatest need. The mandate of the United Nations Convention clearly identifies refugees as those in greatest need. And rightly so.

Many of the larger group are indeed on an urgent quest – but it is a quest of a different kind: A search for a better life. The world must also face the reality of global migration. Such is not within the scope of this Conference, but clearly this reality will have a bearing on all your deliberations. Finally there is the uneven distribution of the burden of helping refugees – flows of asylum seekers primarily affect countries adjacent to those which produce refugees. Mainly in the

Third World, these countries have development problems. They lack opportunities for their own citizens. They can't cope with large numbers of new arrivals. Fifteen to 20 countries in the industrial world provide refugee relief. The impact and response are uneven. We in Canada believe these are world problems. As citizens of the world we must help find solutions. In order to implement solutions, however, we have to understand the problem. Who are we trying to help? Where are they? How many are there? What is the best form of help?

We are all aware of the problem of definition. The mandate of the United Nations High Commissioner for Refugees covers millions but it may exclude many people in desperate, refugee-like situations. They may not fit exactly the description of a person fleeing persecution. They may be internally displaced persons of war zones – people running from the crossfire of civil war. They need assistance, if not protection.

Two possible approaches have been suggested. One is to broaden our international definitions so that we include as refugees people who are involuntarily displaced but fit a broader definition than the 1951 Convention and Protocol. The other approach would be to rely less on international legal obligations in favour of a form of international crisis management – to forestall crises if at all possible, and to develop specific and comprehensive assistance in responding to crises which can't be prevented.

We favour the second approach. Let me explain why. It is, in our view, *absolutely imperative* to separate consideration of the economic migrant from the refugee. Any blurring of that distinction strikes at the very heart of the system.

The national will to embrace refugees and welcome them into their new national home begins in the individual heart and mind. It starts with a clear perception of the plight of the refugee as separate and different – of the refugee as a person in terrible trouble of a special kind; a person in actual danger. If we fail to do this we dull the perception of suffering and need that is the psychological basis for maintaining, and increasing, the public support which is vital in broadening our help to refugees.

It is vitally important that people understand that when we say – refugees are calling on us for help; that the public know exactly what that term means. We must protect that understanding as if it were a vast and valuable international resource in its own right. For that is exactly what it is. Along with other nations we in Canada have come face to face with these realities. This year, some 25,000 people will claim refugee status after arriving in this country. This figure, combined with the 19,000 already in the system, means a total of 44,000 people at some stage of the process. We know on the basis of

experience that 70 per cent of these claims will be made by people who are in fact economic migrants.

We have been confronted over the past year or so with two highly-publicized incidents of irregular arrival on our shores. These incidents illustrate that public support for assistance to refugees and immigrants is easily threatened. There are deeply-held beliefs that can lead to a most unhelpful polarization. Whatever else may be said, I believe that the people of this immigrant nation have a proud history of tolerance and compassion. An orderly, well-managed immigration program is supported by Canadians. And Canadians want us to continue making a special place for refugees. We preserve and strengthen support by information, education, and management of programs so that the focus is on *responding to genuine need*.

Unfortunately there has been a growing knowledge that many claiming refugee status were simply sneaking into Canada through the back door. So the focus has shifted from responding to need, to a focus on the extent to which Canada's fairness and humanitarian traditions are being abused. To maintain public support for helping refugees, we must not allow this perception of abuse to spread. Otherwise it will harm not only refugees but immigrants. We must learn from the kinds of backlash which have erupted in other countries – and ensure it does not happen here. Unless refugee determination and immigration policy is seen to be managed effectively, then our ability to educate and thus mobilize public support for refugees will be diminished in proportion to the perception of abuse. We are committed to preserving and increasing both the government's and the Canadian public's support and efforts for refugees. That is the principle which has guided all our actions.

But answers to the needs of the world's refugees cannot be found in Canada alone or indeed in any other one country.

This is a global challenge. It requires a world response. Several problems need to be addressed in a co-operative way. We need to distribute the burden more evenly. Instead of letting the recipient of each new wave be determined by chance or geography – we should be able to respond in a planned systematic way. We need above all to move our approach to this vast recurring human problem, out of the *ad hoc* era into an era of managed solutions – solutions that do not work just for a year or two, but solutions that endure.

Not every problem would be solved. Even with machinery and a plan we would not be able to anticipate every new tragic episode before it erupts. We would not know in advance the size and makeup of the next exodus.

But we would have common definitions and principles to guide us. We would not find ourselves responding in an *ad hoc* manner to every need. Misunderstandings would decrease, confidence in the

process would rise. Resources available throughout the world – and let us remember they have limits – would be better used.

How do we arrive at this kind of co-operation? We believe, as I have said, that we must act in the framework of existing international organizations. It isn't enough to point to the United Nations Convention and say "there's our answer". It is not, by itself, an answer.

The Convention should be seen for what it is – an important step forward on a longer journey. It does indeed require signatory countries to accept certain obligations to refugees. The Convention focuses however on their immediate needs for protection – the kind that are dealt with so often in the countries of first asylum. Even if every country in the world signed the Convention and met their obligations there would be problems. There is a second generation of needs – long-term and complex – shared by these people. These problems do not simply take care of themselves.

There is another matter where solutions can only be found through international co-operation: that is – the impact of refugee flows on the countries of first asylum, and the countries of final destination. We can help first asylum countries by offering resettlement assistance, sharing the burden by allowing front-line states to maintain their open-door policies. We face questions that can be answered adequately only by the world community acting together. The lead in putting together such an effort must come from international bodies. By bringing people together, the way we have at this Conference, we can propose solutions, compare our experiences, offer new perspectives. In this way, we can offer a real service to refugees.

The refugee – isolated, uprooted, in search of a new home, new community and firm ground on which to stand – is a common phenomenon in this century. The refugee is a tragic fact of our time, in a world fraught with upheaval, tension, uncertainty and inequality.

The solution to these problems does not lie solely in exile. They do not lie solely in countries of first or second asylum. Ultimately, they lie in dealing with the conditions which *cause* exodus. It calls for world action to foresee and attempt to forestall crises.

Because it is an international problem, I am glad there is this Conference which will promote understanding. I am glad the Conference is being held here in Canada, a nation committed to assisting refugees. And because we are trying to help *people* in distress – I am glad to see you the people dedicated to assisting in the search for solutions.

To conclude, when I met with Mr. Hocké we talked of the need for ideas, co-operation, leadership and commitment. I believe you

contribute in each of these areas, in each of your countries. I hope this Conference provides further impetus to us all, for the benefit of refugees throughout the world.

II.
The Nature of the Problem

UNHCR and the Plight of Refugees: International Protection and Solutions in a Changing World Context

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In addressing this subject one must, I believe, begin with the recognition that the scope and complexity of the refugee problem we face today – and are likely to face for the foreseeable future – derive principally from the rapid evolution of the world context since the beginning of the 1950s when the United Nations High Commissioner for Refugees (UNHCR) and the 1951 United Nations Convention Relating to the Status of Refugees came into being. New answers, going beyond established humanitarian law, principles and practices, must be found.

This task is all the more urgent at a time when such law, principles and practices are themselves in danger of erosion as a result of Western governments' defensive reactions to today's phenomena. Such reactions reflect retreat from current global realities rather than resolve to find new answers to them. They are symptomatic of the fact that, despite important progress mostly at the regional level, the development of humanitarian law, principles and practices, and particularly of international structures for concerted action, have not kept pace with the evolution of the world scene. The resulting gap must be narrowed to enable the international community to respond effectively to the graphic needs of the millions of human beings who depend on this response.

When UNHCR was established in 1951 by the United Nations General Assembly it was given the mandate, first and foremost, to provide international protection to persons who, out of fear of persecution, had fled from their own countries and who could no longer count on their national authorities for the protection of their lives, liberty and basic human rights. Such persecution could derive from their race, religion, nationality, political opinion or membership in a particular social group. Beyond providing such protection, UNHCR was asked to strive for solutions to enable refugees once again to live normal lives, ideally back in their own countries, elsewhere if this was not possible. In the performance of these tasks, it was specified that the High Commissioner's work would be humanitarian and social, and of an entirely non-political character.

UNHCR's task at the time of its establishment was limited essentially to the European situation in the aftermath of the Second World War. At that time it was envisaged that this task could be accomplished in a period of a few years. Thus, the Statute of the Office provided for the election of the first High Commissioner for a period of three years, from 1 January 1951. Since 1954, the mandate of the Office has been renewed on the basis of successive five-year terms. In addition, the 1951 United Nations Convention Relating to the Status of Refugees, in its definition of the term "refugee", gave states the possibility of interpreting the reasons for flight, beyond a well-founded fear of persecution, as resulting either from "events occurring in Europe before 1 January 1951" or from "events occurring in Europe or elsewhere before 1 January 1951". It was not until the advent of the 1967 Protocol to the Convention under General Assembly Resolution 2198 of the XXI session that these limitations could be removed through accession to this international instrument.

The 1967 Protocol was necessary to reflect, and respond to, the rapid evolution in the world situation since the beginning of the 1950s. Decolonization, political instability, violent conflicts and upheavals, and persistent human rights violations led to rapid expansion of the refugee map throughout the continents. Today UNHCR provides protection and assistance to refugees and externally displaced persons in a refugee-like situation in more than 90 countries around the world, with annual expenditures that reached a peak of almost US $500 million in the 1980s.

Beyond the unprecedented scope of the Office's tasks today, their complexity and difficulty have also grown rapidly. The revolution in world transportation and communications has brought in its wake a new inter-continental diaspora of asylum-seekers and refugees. Today no country can reasonably consider itself immune to the phenomenon of those seeking asylum. Apart from these considerations, some major refugee situations remain essentially

static because appropriate solutions, such as local integration or resettlement in third countries, are problematic due to lack of progress in the peaceful resolution of the conflicts that were at their source. In such situations the refugees affected pay the the high price of dependency, waiting and despair.

The scale of the challenge is overwhelming: some 12 million men, women and children are in need of international protection and assistance because circumstances compelled them to flee from their home countries to seek refuge elsewhere. The vast majority of these refugees have, moreover, found asylum in developing countries, many of which are among the poorest in the world. Only a truly concerted effort by governments, UNHCR, other multilateral as well as non-governmental organizations, and individuals can adequately address a human tragedy of such proportions. Demographic trends, extreme poverty, drought and hunger have added their own impetus to large-scale movements of persons across national boundaries. That such persons are in need of international assistance in its broadest sense cannot be debated. The question of our time is: how, and by whom?

From UNHCR's vantage point, a basic distinction should be made between three categories of persons: first, refugees as defined in the 1951 Convention. Second, asylum-seekers justifiably fleeing their countries because of danger to life, liberty or human rights violations arising from wars and similar forms of armed conflict or upheaval and thus in need of international protection. The needs of such persons are addressed, in a regional context, by the 1969 OAU Convention and the Cartagena Declaration. For many, the need for protection may be temporary, until the conflict that gave rise to their flight has been resolved. Third, persons fleeing from natural disasters or similarly compelling circumstances not related to a need for international protection and the granting of asylum. This category also includes persons leaving their countries for economic reasons. Has economic migration not in fact become a major issue of our time and one that, unfortunately, can only be expected to rise on the agenda of international concerns? This category of persons clearly requires co-ordinated action by governments and organizations aimed at disaster relief and economic and development aid, which of course lies outside UNHCR's competence.

This categorization, in itself, shows the urgent need for concerted international action, a global approach based on the fundamental principle of humanity. UNHCR has a role to play with regard to the first and second categories of persons, inasmuch as the need for international protection is the common denominator. As an international humanitarian and strictly non-political organization, however, UNHCR cannot adequately address the needs of these persons by itself. It can only be effective in promoting solutions if

governments show the political will to combine established humanitarian principles with action to address both solutions and the root causes of flight. Such action by governments is indispensable to help prevent, limit and solve the problems of those compelled to leave their countries in search of asylum. I will return to this point later.

The evolving world situation has unfortunately led to a growing number of persons in the second category I have mentioned. Although they may be considered not to meet the criteria of the 1951 Convention, such persons are nonetheless in need of international protection and are often granted *de facto* asylum on humanitarian grounds in Western countries. In the absence of a broader refugee definition, such as that of the OAU Convention, applicable in Western countries, their protection, treatment and ultimate fate represent an important cause of concern to UNHCR. It should be noted in this regard that the average recognition rate in European countries under the 1951 Convention has been less than 30 per cent in recent years.

In this difficult context, the High Commissioner's first task remains, of course, the international protection of refugees. This task entails the maintenance of respect for three fundamental principles. First, that of *non-refoulement*, by which refugees may not be expelled or returned to the frontiers of territories where their lives or freedom would be threatened by persecution on the grounds mentioned earlier. A 1977 Conclusion of UNHCR's Executive Committee strengthened this principle by adding "irrespective of whether or not they have been formally recognized as refugees". Second, respect for the physical security of refugees. And third, respect for their other basic human rights.

While these principles continue, by and large, to be observed by states, recurring infractions give cause for serious concern. These include instances of *refoulement*, detention of refugees and asylum-seekers solely on grounds of illegal entry, military and armed attacks on refugee camps and settlements, and piracy attacks on refugees fleeing by sea in Southeast Asia. UNHCR will continue to spare no effort through *démarches* and consultations with governments to ensure that the fundamental principles of international protection and humanitarian practices are respected, and that refugees and asylum-seekers are spared the suffering and death inflicted on them by such infractions.

UNHCR's efforts in this regard are fortunately strengthened by positive developments in the protection of refugees. The Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted in 1969, includes the following important provisions:

- a broader definition of the term "refugee" than that of the 1951 United Nations Convention, so as to include persons "who, owing

to external aggression, occupation, foreign domination or events seriously disturbing public order" are compelled to flee from their home country;

- the affirmation that "the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any member State"; and
- the stipulation that "for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin".

The 1984 Cartagena Declaration contains similar conclusions and has given impetus to *de facto* application of its broader refugee definition by several Latin American countries and to its inclusion in draft national refugee legislation in the region. The Declaration has received increasingly widespread support.

The OAU Convention and the Cartagena Declaration are major landmarks in the effort to come to terms with regional realities and to meet the fundamental needs of those compelled to flee from their home countries. This effort has also been supported by United Nations General Assembly resolutions, by two European Parliament resolutions this year, and by a major breakthrough in October 1987, after six years of discussion, in a Conclusion of UNHCR's Executive Committee on military and armed attacks on refugee camps and settlements. This Conclusion condemns "all violations of the rights and safety of refugees and asylum-seekers and in particular military or armed attacks on refugee camps and settlements" and contains a number of important provisions to enhance the protection of such camps and settlements.

Despite such positive developments, UNHCR's primary task of providing international protection to refugees remains fraught with great difficulties. The gap between governments' obligations under the relevant international instruments, as well as constructive Declarations, Conclusions and Resolutions, and the realities experienced by refugees and asylum-seekers remains too great to allow us to relax our vigilance.

This subject is closely linked to UNHCR's other fundamental task, that of seeking permanent solutions for refugees, a task that is often no less difficult. These solutions are, in order of preference, voluntary repatriation to the country of origin when circumstances permit such return; local integration in the country of asylum; and, where necessary, resettlement in third countries. These three solutions must be pursued from the outset and throughout the evolution of refugee situations, with, of course, due regard to the particular needs and characteristics of each situation.

During 1968 and 1987 so far, some 250,000 refugees were able to return to their countries either through UNHCR assistance or spontaneously. These movements occurred in particular to Chad, Ethiopia and Uganda, while smaller numbers of refugees returned to El Salvador, Guatemala and Nicaragua. They illustrate the important point that refugees generally wish to return to their home countries as soon as conditions permit their return. The creation of such conditions depends first and foremost on the political will of governments. Beyond this, UNHCR assistance to returnees in the country of origin often plays a vital role.

Local integration in the country of asylum has unfortunately not been applied as widely as it could be, except in a number of African countries, China and Mexico. While this solution understandably brings with it political, economic and social difficulties for the host countries, and often requires substantial resources before self-sufficiency is reached, new approaches to enhance its use are needed and are being pursued by UNHCR in co-operation with other agencies. With regard to situations where local integration as such is not envisaged and where resettlement is not a viable solution, UNHCR has made progress in co-operation with the World Bank to promote income-generating projects to enhance self-reliance for the very large numbers of refugees in Pakistan, Somalia and the Sudan.

Resettlement remains the major option in situations where countries, for various reasons, grant only temporary asylum or transit to refugees. This solution has been used for an unprecedented 1.4 million Indochinese refugees from countries of asylum in Southeast Asia which continue to extend their hospitality to more than 130,000 refugees. On a much smaller scale, it also continues to be necessary for Iranian refugees in Pakistan, Turkey and other countries, for refugees of other nationalities, and for emergency cases. It cannot be over-emphasized, however, that large-scale resettlement programs, although they are a laudable example of international burden-sharing, also underline the urgent need to make progress in the pursuit of alternative solutions. Without such progress, refugee situations may become self-perpetuating or the risk of *refoulement* may increase as resettlement opportunities decrease and the prospects of *any* solution become more and more elusive.

The link between international protection and solutions is of course of a more general nature. The scale of today's refugee problem is compounded by its uneven distribution among countries of asylum. The willingness of governments to grant asylum and to extend humanitarian treatment to refugees and asylum-seekers, or to continue to do so, depends to a considerable extent on the prospects of solutions, on the availability of assistance, and on effective burden-sharing mechanisms.

The developments in industrial countries during the past few years are of particular importance in this regard. It is one of history's ironies that the very region that gave birth to the 1951 United Nations Convention and that has championed the cause of human rights in international relations should today be moving in the direction of closing the doors to the spontaneous arrival of asylum-seekers from other continents. The countries of Western Europe have seen a rising trend in numbers of asylum-seekers in recent years: 104,000 in 1984, 170,000 in 1985, and just over 200,000 last year. Between two-thirds and three-quarters of these persons came from countries outside Europe. Canada and the United States have also increasingly become countries of first asylum.

Reactions to this trend have not been slow: new national legislation and procedures, rejections at the frontier, visa requirements, airport detention centres, and sanctions against air carriers have become increasingly widespread. Thus, asylum-seekers find it more and more difficult to gain admission to a safe haven – and even to leave their country of origin at all.

But closing the doors cannot be the answer. It cannot provide solutions to a daunting international humanitarian problem. National or regional *re*action rather than truly international action, burden-shifting rather than burden-sharing, can only lead us further away from solutions, the need for which asylum-seekers and refugees so eloquently express.

The rising trend in arrivals of asylum-seekers from other continents in Western countries must, realistically, be seen in the broader context of the dynamics of South-North migration. Abuse of asylum procedures is a real problem in the absence of significant immigration possibilities. While this problem must be addressed, the legitimate rights and interests of asylum-seekers genuinely in need of international protection must be safeguarded. The restrictive measures increasingly introduced by Western countries are all too often based on blurred distinctions among the various categories of aliens seeking admission. Thus refugees and asylum-seekers in urgent need of international protection are penalized by measures that might be appropriate for other categories of migrants. If such trends continue, established humanitarian principles, and even the 1951 Convention, may be at risk.

The developments in Europe and North America I have sketched are compounded by increasing xenophobia in the region. Thus, public opinion is of great importance, and action must be taken to provide the public with a more accurate picture of the problems being faced and the particular situation of persons genuinely in need of asylum.

In an increasingly interdependent world, the implications of these developments in Western countries for the continued hospitality

of poor developing countries may become a major issue. The prospect of a downward spiral of restrictiveness spreading across the continents must be avoided at all costs.

What can be done? The present scale and complexity of movements of persons across national and regional boundaries excludes any single course of action as the answer. Rather, a number of separate but inter-related steps can be envisaged, not necessarily all within UNHCR's mandate.

First, improved analysis of the causes of such movements and the development of early warning systems linked to structures for remedial action wherever possible. In this respect, the Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, established in 1981 by General Assembly resolution 36/148, has led to the creation by the Secretary-General of an Office for Research and the Collection of Information. This new office should, in time, contribute to an improved early warning capacity.

This capacity must, however, be linked to structures for action if results are to be achieved. I have already mentioned the dynamics of South-North migration. Apart from the compelling forces of persecution and those contained in the broader refugee definition of the OAU Convention and the Cartagena Declaration, abject poverty and lack of prospects for a better life create their own "push" to the North and are a major factor in abuse of asylum procedures. If the new office established by the Secretary-General is able to develop and continuously update an overview of the various situations in which people feel compelled to leave their countries or regions of origin, the problem of a co-ordinated international response remains. The development of new structures for action, in which the United Nations Secretariat, governments, development and other relevant agencies, and UNHCR each have a role to play, deserves urgent attention.

Second, the needs of refugee-producing and refugee-receiving countries in the Third World, and of countries of temporary asylum or transit, must be addressed more effectively, in terms of material assistance, resettlement places where appropriate, and efforts aimed at solutions to refugee situations. With regard to solutions, a complementary division of responsibilities and tasks between governments and UNHCR is essential to progress. Development aid and political and diplomatic action are means available to governments that can be applied more effectively.

Third, a humane international response to the needs of asylum-seekers justifiably in search of international protection, whether or not such persons individually meet the criteria of the 1951 Convention, must be assured so long as safe return to countries of origin cannot be responsibly envisaged.

And *fourth*, ways and means should be found to decongest and shorten national asylum procedures without detriment to legal and humanitarian guarantees and safeguards. Related action should be taken, wherever possible, to return to countries of origin in a humane and safe manner those persons found not to be in need of international protection.

It should be clear that the nature of the problem demands a global approach based on what has already been achieved in the development of humanitarian law, principles and practices. Piecemeal action and defensive reaction to the challenges we face today and will certainly face in the future cannot be the answer. At the same time, the response of the international community to these challenges will determine whether we meet or fail one of the major tests of our time.

The International Refugee Protection System

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In this address I want to focus on the nature of some of the problems in the international refugee protection system, not from the American government point of view, but from a private sector, NGO point of view. I want to deal with some concepts that can be useful as parameters in the discussion of refugee issues. This is critical because it is not only the case, as Fiorella Capelli pointed out, that there is a misunderstanding, widely subscribed to by the public and the policy makers, as to the nature of refugees; but there is also too limited a conception of what the international refugee protection system is, or ought to be, about.

There is an international system of refugee protection. It ranges as far as the border between El Salvador and Honduras, where men and women on horseback and on foot carry a responsibility for trying to provide protection to refugees who may be exiting El Salvador and going into Honduras. It is as far-flung as the three-nation border between Sudan, Uganda and Zaire, where men and women from UNHCR, from NGOs and others maintain a radio net, trying to ensure, in a very unstable situation, that refugees who are returning from Zaire, from Sudan to Uganda are protected adequately. It is a system that is as far-flung as the border between Thailand and Laos, where men and women representing UNHCR are part of a screening system that attempts to deal with people who are asylum-seekers from

Laos, to distinguish whether their *bona fides* represent an adequate case for refugee status or not. It is a system, and if we have learned anything from the environmental movement, it is that if a system is altered in one place, it can affect the entire system. This is an important concept to keep in mind when approaching this issue.

The elements of the system include laws and doctrines; the established international agency, private agency and governmental roles; the national implementing statutes that attempt to take the humanitarian concepts that have been embodied in national practice for more than three decades and translate them into the way business is done on a daily basis. The system is inherently legal, but it is much more than that. It is political, with a small p. It is a system that attempts to influence the way governments and others deal with people who fall within the purview of the system. It is a deficient system, but it has worked reasonably well in an impossible political situation. It is a system that, having worked reasonably well on the basis of some international consensus, is very important to preserve. It is also a system that was intended to be universal in nature, but that relies entirely for its effectiveness on governments. That is a strength in many ways, because governments are the ultimate doers within the international society in which we live. But it is also a very critical weakness, because as governments seek to pursue what they may perceive at any given point in time as their national interests in a limited fashion, it can dramatically undermine the system.

This system does not seek to meet the needs of all the world's worthy, needy people. In many cases, there are people in far more dangerous situations than some refugees are. It is almost impossible to conceptualize the entire population at risk, but what this system attempts to do is to distinguish from that entire group those people in need around the world and define a class of people that, in meeting the definition of the class, become a population of international concern. The fact that there is some consensus upon which to build this approach is critical for judging the worth of this system. It is a system that has generally, over a period of three decades, evolved in a progressively more generous, humanitarian fashion. Lastly it is a system in which Western interests and Western diplomatic support have been the ultimate driving impetus.

Most refugees are not coming to Canada; neither are most refugees coming to the United States. Those who do seek to come represent a comparatively small fraction of the 12 to 15 million people that Fiorella Capelli stated fall within the parameters of people of international concern as refugees. However, there is a tendency to think of those that are coming here as the vanguard of millions who would come here if they could. Thus, what has happened, particularly over the last eight or nine years, is we have increasingly adopted,

publicly and within our policy establishments, a concept that has skewed the way we view refugee protection. We have increasingly approached this topic from narrow immigration enforcement positions. This is a conceptual problem, because it does not fairly represent the needs of refugees worldwide or the needs of an international system. Too often this idea, which has dominated refugee protection discussion for particularly the last eight or nine years, has skewed and undermined a more generous approach to people whose *bona fides* in a human rights and humanitarian concept ought to be able to be dealt with. This is especially true when those refugees or asylum-seekers are from the Third World, when they look, think or act a little differently than most of us in the United States and Canada.

In saying this, I do not mean to suggest that there is not an important immigration element to approaching the refugee phenomenon. Of course there is. There are critical immigration issues, concerning the control of movement across borders, that go to the very heart of the concepts of statehood and nationhood. What I do mean to suggest is that this skewed focus that seems to have developed has meant that in attempting to approach genuine immigration issues we have jeopardized some very important international refugee protection principles. Unfortunately, this increasing restrictiveness has taken place largely in those developed Western countries that were instrumental in the creation of this system in the first place.

Indeed, North America and Western Europe are currently mutually reinforcing each other's worst instincts. I received a letter a few months ago from Elliot Abrahams, who is the Secretary of State in the United States for Western Hemispheric Affairs. He was commenting on a U.S. Committee for Refugees report that dealt largely with the U.S. practice of interdicting Haitian asylum-seekers at sea. He said in the letter that we had not dealt so badly with the Haitians; indeed, our policy was in the mainstream if we look at what the Swiss are doing with the Tamils. What I am trying to suggest is that those individuals who helped establish this very important system are now reinforcing each other in a downward, retrogressive approach. Perhaps they hope that, despite the West being more restrictive, the developing world will continue to be generous. But we are dealing with a system, and when you tap on one part of the system, it often has vibrations throughout the entire system. Thus, those who have provided the strongest diplomatic, political and other support for international refugee protection have their own skirts dirty. And having dirty skirts has impaired their ability to provide the leadership that this system needs.

The first point I would like to leave you with is that this is a system. The second is that it is a big mistake to bury the guardianship of this system in too narrow an immigration enforcement context. This system was born in a human rights context and it can die in too narrow an immigration enforcement context.

I would like to turn to the United States as an example, because the leadership of the United States and other countries is obviously key to supporting this system. The United States is a generous country, in terms of immigration, financial support of international refugees, refugee resettlement and, in many senses, the granting of asylum to people who are in need of asylum. But in the U.S. structure for dealing with international refugee protection there seems to be no one who has a concern for the entire system, or a conceptualization of refugee protection as a system. Many of the fundamental elements of the U.S. approach to international refugee protection are immersed in an immigration context. The Refugee Act of 1980 is a provision of the U.S. Immigration and Nationality Act, so the entire statutory base for the way the United States is approaching these issues has a flavour of immigration enforcement. The Coordinator is a position defined in the Migration and Nationality Act of the United States. The functions of international care and of refugee resettlement are located within one bureau of the U.S. State Department, but the functions dealing with asylum are in an entirely different bureau, both of which have to deal through the Immigration and Naturalization Service. The Congress has structured itself in such a way that the very committees that have the lead responsibility for refugees and refugee issues of a broader nature are those committees that are preoccupied with immigration issues. The problem is not only that there is no unified focus in the U.S. government for approaching the refugee system, but also that the worst elements of the way the United States has approached this issue have been within the asylum context, elements that do not relate well with the other parts of the American approach.

Those worst elements include, first, the interdiction of Haitian asylum-seekers at sea. I do not believe that all of them were refugees, but of all the thousands that have attempted to enter the United States and been interdicted since January of 1981, only two were found worthy of coming to the United States and being provided asylum. The second element is the long-term detention of asylum-seekers. In the United States you can get more time in jail today for being an asylum-seeker in an unacceptable way than you can get for real crime. The deportation of some people who have reasonable cases in terms of their concerns about their own jeopardy back home is the third element. There is thus in the United States a lack of focus on an international refugee protection system and an undermining of that system by ham-fisted immigration approaches that may be being

effective in dealing with immigration but sweep up *bona fide* refugees and asylum-seekers.

An additional problem involves the UNHCR. Until several years ago, within UNHCR there was a Division of International Protection that had rather broad responsibilities. That division no longer exists. It has been replaced with a Division of Refugee Law and Doctrine and by a concept that everybody within UNHCR ought to be responsible for international refugee protection. The obvious danger in suggesting that everybody is responsible is that no one will be clearly responsible. At a time of vulnerability for the entire international refugee protection system, this is a problem because we rely on UNHCR to be the articulator of the standards to which we all aspire in the refugee protection area.

To summarize, we should reassert the fact that refugee protection, although it has an immigration impact, is inherently a human rights issue. Second, the international community has attempted, over a period of time, to build a universal system. This will be threatened by balkanization if the concept of regionalizing international refugee protection is followed. Third, governments have a legitimate responsibility for achieving control of movement across their borders. However, if this is not done correctly, it can jeopardize the entire international refugee protection system and contribute to its undermining. We need men and women in our governments who can deal with the fundamental immigration issues in a way that is fully cognizant of the universal system of refugee protection and who realize that control and generosity do not need to be mutually exclusive. It is possible to approach these issues in a way that achieves improved control of movement across borders, but is generous towards *bona fide* asylum-seekers and refugees. Fourth, one of the fundamental responsibilities of UNHCR is to be the keeper of the flame. It does not have any independent capacity to flout the will of governments, but it must be the articulator of what is acceptable practice. It must be the custodian of the highest and best that the international community has to offer people who are refugees or *bona fide* asylum-seekers. If we keep these points in mind we can help avoid what could be further erosion or permanent damage to a system that is of great importance to many people that we will never see.

Refugees' Rights and International Obligation

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In this paper I shall focus on the important relationship between the question of refugees and the issue of human rights. To state the matter plainly: if we weaken in our resolve to uphold the right of refugees to move spontaneously under the provisions and protection of the Convention, then – as Capelli has argued – we risk undermining the entire refugee system.

Until the twentieth century, the outlines of international law were conceived of solely in terms of relationships between sovereign states. The rights of the individual were considered only insofar as these were an extension of the rights of the state of which he was a member: a national of one country could travel to another and enjoy protection, not because his status as a human being entitled him to it, but because the government of the state to which he travelled had undertaken obligations with the state of nationality that were reciprocal in character and that ensured that the nationals of both could travel freely and unhindered. Refugees, having no state to provide them with access to such protection, could not benefit from such arrangements. While some attempts were made to recognize the rights of individuals – in the International Labour Conventions, for example – such recognition remained firmly rooted in the principle of national sovereignty.

It was only after the horrors of the Holocaust showed the terrible potential of national laws to do harm that countries realized that there had to be international laws that transcended national sovereignty. The dreadful evidence of what could happen when barriers were placed in the way of offering help to people facing persecution was a convincing argument for a form of international law that would provide a means for interference. This concern was addressed initially by the Universal Declaration of Human Rights, which proclaimed that states did not have unlimited powers to abuse their citizens. Although the Declaration was not itself a binding document, its catalogue of rights deserving protection found a place in a series of Conventions ratified by various states.

These Conventions dealing with human rights protected individuals against the actions of their own states, but did not deal with the issue of refugees. The 1951 Convention seems to me a logical extension of the Universal Declaration of Human Rights, in that it recognizes that aliens should be afforded the same protection as those individuals who can nominally at least seek the protection of their state. The UNHCR has in a very real sense become the protecting state for refugees: it has a population for which it has a responsibility as profound as the responsibility that other states have for their own citizens, but recognition of its status as a peer in the community of states has been slow in coming. The UNHCR continues to be a supplicant for funds; it must operate in a political structure where other states can and often do attack it; it is circumscribed in so many ways and so limited in its initiatives that I do not believe it has been able to fulfil the vast mandate implied in the creation of the Office of the UNHCR and the adoption of the Convention and later the Protocol.

The coming into existence of the Convention created a profound change in attitude toward individual rights. In its absence, states had exercised an absolute right to decide who could come into their territories and under what criteria such people would be selected and allowed to remain. The Convention states that while the obligation of a signatory to the Convention falls on the state, the right rests with the individual. A person who comes spontaneously to the territory of a state and asks for protection has the right to tell his story and to make his claim, the right to be judged on the merits of his case, and the right to be protected, if he is a refugee according to the definition incorporated in the 1951 Convention and its Protocol. The state has the obligation to hear that person's story, to adjudicate the claim fairly, and to offer protection if that person is found to meet the criteria set out in the Convention. The selection process devised for immigrants, and factors arising from bilateral relations with other countries, are inappropriate considerations where refugee

determination is concerned. The highest measures of the moral character of our country should be our willingness to allow individuals who have no claim on us, save that they are victims of persecution, to make a claim on us for protection and our readiness to meet that responsibility and offer that protection, in fulfilment of our obligations under the Convention.

What concerns me most in the context of the present debate is that we seem to be regressing to concepts that existed before the Convention came into being. It is as if we had agreed to forget what happened in the past when sovereign rights of states went unchallenged. A nation answerable only to its own political interests believes it can free itself from its difficulties by casting aside moral and economic burdens, but in doing so, it will show itself prepared to deprive its own citizens of their rights. The most horrifying aspect of National Socialism in Hitler's Germany was that no protection in law was available to those whose rights were progressively eroded and who eventually became victims of the most extreme forms of persecution; the authorities to whom they should have been able to appeal had been incorporated into the machinery of their destruction. The atrocities of this period did much to win international consent to the idea that the obligation to help those who are being persecuted transcends national law.

It is therefore most disturbing today to find a distinct terminology being used by respectable public figures and opinion makers that implies that individuals who have spontaneously arrived in Canada or are likely to do so in the future possess no rights. Words and phrases like 'bogus refugees', 'illegals', 'queue-jumpers', 'phony asylum-seekers', 'human contraband', 'influxes' and 'floods' help to justify a retreat from international obligations. The rights that people in need have been given under the Convention are being effectively delegitimized in the context of an outmoded concept of national sovereignty. Canadians should be particularly sensitive to human rights having so recently achieved entrenchment of them in our Constitution. Since World War II, the international community has acted, through declarations, conventions and covenants, to protect individuals and groups who are susceptible to abuse. The 1951 Convention Relating to the Status of Refugees was one of the first binding international agreements, a recognition of the particular vulnerability of refugees. The plight of refugees has not diminished since then; our commitment to them should not be weakened either.

Professor Adelman discussed the obligation of states to protect refugees, and he spoke of the alternative poles of self-interest and self-sacrifice. While refugees may make good citizens and resettling them may help stabilize the world situation, I should be inclined to argue that self-interest is not the most compelling reason for accepting

refugees. Nor do I believe that accepting people who would not normally be selected as immigrants ought really to be called self-sacrifice. It is an ennobling of the spirit that ought be seen more as an opportunity than an obligation. Jewish mystics tell the story of the dove that complained that its heavy wings were a burden, until it discovered that they enabled it to fly; that dove is a symbol of the way Jewish law should be seen not as a burden but as a means of spiritual elevation. I think that we should look on the opportunity to receive refugees in the same way. We on the Refugee Status Advisory Committee are grateful for the opportunities our work affords us, because in recognizing the sufferings of each refugee who comes before us and extending protection by means of our advice, we can affirm our commitment to those values that gave rise to the Convention.

I will conclude by noting a comment of Professor Stein's. In his paper he permitted himself to wonder what would have been the result if, a decade ago, governments had allotted sufficient resources to the creation of a fair system for hearing asylum claims. I should add that if since that time we as Canadians had made a greater effort to allay fears rather than to foster them, if we had tried hard to overcome ignorance rather than to exploit it, and if we had referred back to that special moment in our history when we affirmed our pride in being Canadian by opening our doors to the Indochinese refugees, we would now be set on a course toward a just refugee policy for our country.

The Nature of the Refugee Problem

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In providing a legal and political perspective on the nature of the refugee problem with regard to international protection[1] of refugees, I will begin by discussing some background trends in international refugee affairs that have converged in the late 1980s to cause and exacerbate a crisis in refugee protection. Then I will discuss some of the main protection issues and conclude with some suggestions to lessen the crisis.

The trends include the fact that there has been a decline in durable solutions for refugee situations, so that a majority of the world's approximately 11 million refugees[2] have been waiting for an effective solution for more than half a decade. A second trend is that refugee problems increasingly involve not just developing countries but low-income developing countries – the poorest of the poor. Third, most refugees have not fled from 'classic' refugee situations involving individualized persecution but rather from invasion, social and political upheaval, internal conflicts, and other forms of generalized violence. For this reason the variety of groups receiving international assistance has increased greatly, so that no single refugee definition suffices. Instead there are multiple definitions for multiple purposes. Fourth, large numbers of refugees and asylum-seekers are travelling from their home regions to other continents, particularly to the developed states of North America and Western Europe, in search of

safety and a decent life. Finally, there is major political involvement by outside powers, backing either the regime in the country of origin or the exile warriors seeking that regime's overthrow, in the largest and most intractable refugee flows.

The main protection issues that are part of the crisis include attacks on and abuse of the physical safety of refugees; deterrence of refugee movements by means of unjustified detention, closed camps, meager rations, and other restrictive measures that threaten to bring the treatment of refugees and asylum-seekers below decent standards; the failure of legal systems based on due process to separate fraud and abuse from genuine refugee claims equitably and expeditiously; and the growing pressure to induce refugees to 'voluntarily' repatriate to homelands where no fundamental change in the conditions that caused the exodus has occurred.

Steps that might be taken to lessen the protection crisis primarily involve more effective promotion of durable solutions, including increased reliance on resettlement in developed countries; more effective support of voluntary repatriation; and the naturalization and integration of long-staying refugees.

International Protection

In the primary international definition of a refugee, from the United Nations Convention Relating to the Status of Refugees (1951), two elements – political controversy and lack of protection – are paramount. A refugee is one who "owing to a well-founded fear of being persecuted . . . is unable or, owing to such fear, is unwilling to avail himself of the protection" of his country. Simpson (1939) indicated that a refugee flees "as a result of political events . . . which render his continued residence impossible or intolerable." A refugee is unwilling or unable to avail himself of his country's protection because of a political controversy "that is so serious as to impair the basic relationship between the individual and the government. . . . Fear has taken the place of trust, and hatred the place of loyalty". (Grahl-Madsen 1966)

International protection of refugees is international law's substitute for the protection that the refugee's country of origin cannot or will not provide. As the United Nations High Commissioner for Refugees (UNHCR) indicated in the 1986 *Note on International Protection*:

> International Protection involves first of all legal protection, i.e. seeking to ensure that refugees are treated in accordance with internationally accepted standards including protection against *refoulement* . . . . Secondly, it

> entails action to promote the development of standards for the treatment of refugees.... Finally, and perhaps most importantly, it also involves a search for durable solutions,... which is an essential pre-condition for the effective exercise of the High Commissioner's international protection function.

There is an intrinsic relation between durable solutions and protection. Without a solution the need for protection is open-ended. "To be effective in the long term, 'refugee law' must remain linked to its objective – the re-establishment of the refugee within a community". (UNHCR 1986)

Background Trends

The nature of refugee problems has changed substantially in the 35 years since the drafting of the refugee Convention and the establishment of UNHCR. The most important change has been a shift in the focuses of refugee problems from the developed societies of Europe to the developing countries of Africa, Asia and Latin America. There have always been major refugee movements in the developing countries, but in the past, they were not the centre of attention. However, since the mid-1970s, the main problem of refugee protection and assistance has been "the massive arrivals of refugees in low-income countries where often no durable solutions are at hand". (Hartling 1983)

Low-Income Hosts

Refugees today come overwhelmingly from the rural areas of the poorer developing countries and find refuge in rural areas of other low-income countries. Of the 36 countries listed as low-income (less than $400 per capita GNP) in the *World Development Report 1986* (World Bank 1986), 27 are or recently have been involved in refugee or refugee-like situations, whether as sources of refugees, sanctuaries for refugees or both. A massive refugee inflow into a low-income country can be a major burden for the host country and the local population in the affected area.

The burden on the low-income hosts is not being shared effectively by the rest of the international community. Of the world's 11 million or so refugees, more than 90 per cent are from developing countries and more than 90 per cent will stay in developing countries. The primary durable solution involving developed countries – resettlement – assists only about 1 per cent of refugees each year.

Developed countries, of course, are also involved with large numbers of people seeking asylum. However, until large numbers of refugees are granted asylum and its attendent permission to become members of their new communities, these countries are not providing many of the applicants with a durable solution. Refugees from less developed countries are being aided by and in less developed countries.

Durable Solutions

There are only three durable solutions: voluntary repatriation, local settlement, and third country resettlement. A durable solution requires the integration of the refugee into a community—either re-integration at home or integration into a new community. With integration, which requires secure legal status as either a citizen or a permanent alien, the need for international protection ceases.

Unfortunately, in recent years there has been a slowdown in the provision of durable solutions. There has not been a significant increase in the number of refugees; rather there are more refugees awaiting a solution. Certain unfortunate refugee groups for whom no durable solution is ever found become a semi-permanent part of refugee problems. There are still Palestinian refugees from the 1940s; Eritrean and Rwandese refugees from the 1960s; Saharawi, Indochinese, Burundian, Afghan, and Ogaden Somalis from the 1970s.

> Half a decade ago, the High Commissioner informed the Executive Committee of the presence in the world of some ten million refugees in need of international protection. The overwhelming majority of the refugee situations which had arisen at that time remain because effective durable solutions have so far not been found.
>
> In some refugee situations, flows have now lasted for over a decade.
>
> While being a refugee should be a *temporary* state of affairs, there is a real danger of refugee situations and the problems of refugees becoming institutionalized and of people remaining refugees forever. (UNHCR 1986)

Most refugees today are not offered a durable solution. They are provided instead with extended temporary asylum. Extended temporary asylum is long-term asylum, even open-ended in duration, but without permission to stay and integrate in the refuge. The host state insists that someday the refugees will either go home or leave for elsewhere. This temporary asylum takes many forms, from detention centres and closed "humane deterrence" camps, to reception centres

and camps with self-help and employment opportunities, to long-term settlements that have the potential to be self-sufficient. By its very nature temporary asylum does not offer the conditions for integration into the community. Those states that provide only temporary asylum are giving a clear message that they will not be the source of a durable solution for the refugees.

Extended temporary asylum leaves refugees in long-term limbo, midway to nowhere, unable to rebuild or begin a new life. One Ethiopian refugee in Sudan in 1980 commented: "We left our country to escape tyranny. But the life we lead as refugees has its own tyrannies". (Gupte 1980)

> It is no great success, save in the short term, to have refugees confined in a state of dependence, in a jurisdictional limbo far removed from a true community, where education and employment are lacking, where civil status is denied through the non-recognition of births, deaths and marriages, or where the natural processes of interaction and exchange with host communities are not permitted. (UNHCR 1986)

Extended temporary asylum without integration leaves refugees at risk and in need of international protection for years, even decades. In 1982 Rwandese refugees who had been in Uganda for two decades, and who had achieved self-sufficiency in their settlements but had not been given citizenship and had not integrated with the local community, were attacked; many were driven back into Rwanda or forced to take refuge at relatively unaffected refugee settlements in other parts of Uganda. (Winter 1983) Similarly, the tragedy of the Palestinian refugees illustrates the continuing need for international protection if a durable solution is not provided.

Often there is a direct connection between international protection and durable solutions, with temporary asylum being linked to the availability of a durable solution. Thailand has long insisted that Indochinese refugees, particularly Khmer and Vietnamese, must be resettled in third countries. In June 1979, to demonstrate its resolve regarding resettlement, Thailand forcibly repatriated 44,000 Khmer refugees with a great loss of life. This action led to an international commitment to resettle the refugees. Since 1979, whenever international resettlement programs seemed to falter, Thailand has threatened to re-examine the refugees' status. Indeed, in March 1987, Thailand threatened to move some 20,000 Khmer refugees – most of whom had already applied for resettlement and had been rejected by the Western countries – from the Khao-I-Dang camp to the Thai-Cambodian border camps where they would be in greater

danger and protection would be more difficult. Only about 400 Khmer refugees were moved to the border, but the threat remains.

There are many reasons why only temporary asylum rather than a durable solution is offered to many refugees. Among the more prominent are that support for the refugees' political cause – particularly independence, secession or autonomy – might be weakened if they were integrated and ceased to be a visible reminder of the cause; the size of the refugee population may be too large, either in absolute or relative terms, for the host to absorb; fear of a "magnet effect" – that providing a durable solution for some refugees would encourage more refugees to flee to the host country; concern about being accused of giving priority to refugees rather than the problems of needy nationals; and worry that the refugees' ethnic, social, cultural, or political background might make them unacceptable to segments of the population and unable to integrate. (Stein 1986)

'Classic' Refugees

Another trend complicating international protection for refugees is that "the majority of today's refugees are persons who do not fall within the 'classic' refugee definition in the UNHCR Statute".[3] (UNHCR 1985) Rather than fleeing because of individual fear of persecution, they have fled generalized violence, internal turmoil, situations involving gross and systematic violations of human rights and, in the words of the OAU (Organization of African Unity) Refugee Convention of 1969, "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole" of the country.

Most contemporary refugees are externally displaced persons rather than 'classic' refugees. They are not fleeing a political controversy that involves them personally. Often they are getting out of harm's way rather than fleeing persecution. Many who flee from a land suffering from a protracted, low-intensity conflict may be fleeing from a proximate cause other than the conflict itself. Years of conflict lead to adjustments and experience that provide some degree of safety for individual civilians. The final push toward a mass exodus is not generally the direct result of the familiar conflict, but a last-straw change in conditions such as famine, drought, or increased fighting that is too close for comfort.

The international protection needs of externally displaced refugees are different from those of classic refugees. Such displaced persons may not fear their government or whoever normally controls their region. They may well be unafraid and willing to return home to an insecure land if the proximate cause has eased even though the low-intensity conflict persists. In such cases the basic bond of trust

and loyalty between citizen and government may not be broken, although the government has been unable to protect its subjects.

Since the mid-1950s UNHCR and the international community have been evolving responses to these non-classic refugee situations. Primarily through General Assembly resolutions, the mandate of UNHCR has been extended repeatedly to cover additional refugee situations, so that it now includes most of those who are in "refugee-like" situations. (Gordenker 1987) However, although the ability of UNHCR functionally to protect and assist refugees can be enlarged by means of General Assembly resolutions, such resolutions are recommendations only and cannot impose new or greater obligations on sovereign states. (Goodwin-Gill 1983)

Distance has an impact on states' willingness to assist non-classic refugees and to co-operate with UNHCR's extended mandate. States apply different refugee definitions depending on whether the victims are near or far from their borders. Most states have little difficulty with the extension of UNHCR's mandate to include war victims, internally and externally displaced persons, repatriating refugees, and other "helpless victims of man-made disasters without the possibility of safe return", (UNHCR 1985) so long as they are called upon to provide or fund assistance in some country other than their own. However, when such persons move out of the region in which they originate, when "they move individually to other regions where, due to the application of the "classic" refugee definition, they are not regarded as refugees", (UNHCR 1985) problems arise.

A confusing situation has developed whereby the international community is using multiple definitions for multiple purposes. A person who has fled a civil war will be defined as a 'refugee', using UNHCR's extended mandate, needing protection and emergency assistance while in a refugee camp in a low-income country. However, if that same individual comes to one of the developed countries of Western Europe or North America, which may well be funding and assisting the emergency effort, a different definition – the 'classic' Convention definition – will be used to determine whether the person is an economic migrant or lacks a fear of persecution or is otherwise not entitled to protection outside of his or her original region.

The transcontinental migration of refugees and economic migrants needs to be seen in a broader historical context. Once people have been uprooted by violence, they will not necessarily stop their trek to safety and a new life at the nearest frontier. Many – a small percentage of the total flow but seen as numerous in their destinations – will try to escape the limbo and tyranny of life in extended temporary asylum. They will go to lands rumoured to be golden or to countries somewhat familiar on account of former colonial connections. Afghan refugees from the camps in Pakistan, Sri

Lankan Tamils from refugee camps in Tamil Nadu, Ethiopians from settlements in the Sudan, and many other Third World refugees have traveled to Europe and North America in search of communities where they can put down roots and begin anew.

In a sense the 'problem' of refugees begins with control of boundaries and immigration. At the turn of the century millions of people who were refugees, economic migrants or a combination of both fled from Europe, but they were not seen as a problem because the doors were open. Among the tens of millions who entered the New World, none were refugees because no one was classifying or counting. Today the boundaries of the developed states are porous, but those who penetrate them are unable to get secure legal status unless they can negotiate complex administrative and judicial procedures.

However – and this is part of the attraction drawing refugees to the developed countries – failure to negotiate the complex system successfully does not necessarily mean deportation to one's homeland or a third country. In the United States a recent General Accounting Office study (1987, 3) found "about 2 percent of the denied [asylum] aliens had been deported . . . about 80 percent had uncertain immigration status." The result is creation of refugee sub-groups who are denied formal recognition but not deported; left in legal and social limbo, they are unable to work and are denied assistance.

Political and Foreign Policy

Almost all refugees are caused by government action; and international protection and durable solutions are dependent on the political will, diplomacy and statesmanship of governments. Protection and durable solutions cannot be dealt with in isolation from the political, social and economic divisions of the world. "Humanitarian action for the benefit of refugees can never be entirely successful, without at the same time treating the underlying causes of refugee movements". (UNHCR 1985)

The root causes are well known; they are the daily bread of the United Nations system and foreign and development ministries around the globe.

> War and violence – a huge number of continuing armed conflicts in various areas of the world; the brutal violation and abuse of human rights, systematic and particular, in most countries of this planet; and the ruthless disparity of rich and poor or, more precisely, grinding poverty brought on by various natural and manmade causes, again suffered by most of the world's peoples. (Moore 1987)

Refugees result from such causes, sometimes deliberately, other times as an incidental by-product, but the existence or fate of the refugees will likely be ignored as a reason for resolution.

> In instances where the political interests of States take precedence over humanitarian concerns, the effective international protection of refugees cannot be achieved. In other words, in situations where durable solutions are not offered by States, the international protection of refugees will suffer. (UNHCR 1985)

Outside powers are heavily involved in the largest and most intractable refugee flows. This involvement – by the great powers and others such as South Africa, Cuba and Vietnam – includes supporting regimes that cause major refugee flows and backing refugee warrior groups that seek to overthrow or destabilize governments. Increasingly, refugees are seen as foils to exploit for the benefit of state policies. The United States Coordinator for Refugee Affairs recently commented, "The same nation-states which are providing significant humanitarian assistance to refugees may, at the same time, be pursuing policies that have the effect of generating refugees". (Moore 1987)

Protection Issues

These background trends have converged in the late 1980s to contribute to a growing international protection crisis. In this crisis the main protection issues are armed and military attacks on refugees; deterrence of refugee movements by inadequate assistance and abusive treatment; the inability of legal systems in developed countries to deal with genuine and fraudulent refugee claims equitably and expeditiously; and growing pressure to induce refugees to repatriate 'voluntarily'.

Attacks on Refugees

There is no more pressing international protection issue than the danger posed to refugees by armed and military attacks on refugee camps and settlements. In any year hundreds of refugees are likely to be killed and tens of thousands threatened by such attacks. Refugees have been endangered by attacks from their country of origin, by the military of their host government, by hostility from the host population, by infighting among refugee groups, and by the military activities of refugee-supported exile movements. Refugees are caused

by political controversies that do not necessarily cool because of the refugees' exodus. Many refugee facilities have served as bases for recruitment, willing and forced, rest, training, and even of operations against their homeland.

In these military activities refugee groups are often supported and exploited by regional or major military powers. The outside powers may support the refugees' political cause, but often their goal is to prevent a rival from consolidating gains, to raise the enemy's costs, or to destabilize other regimes. Numerous refugee warrior groups have been dumped when their patrons found other means to achieve their goals.

A short list of refugee camps and settlements attacked in recent years would include the following: raids by Sudanese rebels in southern Sudan on Ugandan refugee settlements, causing 60,000 to flee back to Uganda; the regular battles between the Vietnamese Army occupying Kampuchea and the Khmer guerrillas based in the midst of 250,000 refugees on the Thailand-Kampuchea border; Afghan bombings of refugee camps believed to be mujahedin bases inside Pakistan; the 1982 attacks, organized by the ruling party of Uganda, on Rwandese refugee settlements that forced 50,000 refugees back into Rwanda; Honduran Army raids on Salvadoran refugees at the Colomoncagua camp; the frequent South African raids on refugee camps and settlements in neighbouring countries; and the endless bombings and massacres that have been inflicted on Palestinian refugees by almost all sides in the Middle East. Many refugees are also regularly the victims of abuse and exploitation by their hosts and by fellow refugees. (Crossette 1987)

In the early 1960s, when attacks by Inyenzi guerrillas back into Rwanda threatened to embroil several host countries in conflict with Rwanda, UNHCR tried to prevent future incidents of this type by moving refugee camps away from borders and by promoting the view that the grant of asylum is a humanitarian act. However, the political and military usefulness of refugees is so great, particularly when the host government supports their cause, that refugee warrior activities never ceased. By 1981 the problem of attacks on refugees, particularly by South African forces, had become so severe that UNHCR's Executive Committee (ExComm) took it up but was unable to resolve the different points of view.

One view, mostly associated with the donor countries, relies on the "principle of separation" – that refugee camps and settlements must be used exclusively for civilian and humanitarian purposes and that countries of asylum, concerned United Nations bodies and refugees themselves should spare no effort to ensure their civilian and humanitarian character. In this view the maintenance of the civilian

character is a pre-condition for the condemnation of military and armed attacks on refugee camps and settlements.

The other view, held by many liberation fronts and countries of refuge, while recognizing that camps and settlements should be used exclusively for civilian and humanitarian purposes, are reluctant to agree that this should be a pre-condition. In their view, all military and armed attacks should be condemned in unequivocal and unqualified terms, "since such attacks were contrary to international law, in so far as they (i) violated the physical safety of refugees . . . and (ii) constituted an act of aggression against the sovereignty of the host country". (UNHCR 1985a, 7)

A key issue in this dispute is whether UNHCR or other international agencies should have access to refugee camps and settlements and thus be able to certify their civilian character.[4] If UNHCR has a right of access, the national sovereignty of host states would be compromised. This issue is further complicated by the fact that several refugee liberation fronts, such as the Pan African Congress, the African National Congress and the South West Africa Peoples' Organization, have special international standing within the United Nations system as representatives of their people or as legitimate partners for handling UNHCR assistance. (Clark 1987)

> The linking of UNHCR protection to the "principle of separation" was the subject of animated discussion at the 1987 international symposium on refugees held at the University of Dar es Salaam. At this meeting representatives of all three of these fronts agreed that to accept UNHCR protection would have the effect of "neutralizing the struggle". (Clark 1987, 32)

After years of stalemate, "a consensus, transactional text which balanced opposing points of view" (UNHCR 1987c, 6) was adopted at the thirty-eighth ExComm in 1987. "A delicately balanced package unobjectionable from the point of view of international law, . . . with full respect for the principles of national sovereignty", the Conclusions on Military and Armed Attacks on Refugee Camps and Settlements are predicated "on the assumption, *inter alia*, that refugee camps and settlements have an exclusively civilian and humanitarian character" and thus "condemns all violations of the rights and safety of refugees". The key access issue was compromised by concluding that:

> States have a duty to co-operate with the High Commissioner in the performance of his humanitarian protection and assistance functions, which can only be

> effectively accomplished if he has access to camps and settlements of his concern. (UNHCR 1987d, 7-10)

Considering the dedication of many refugees to their cause and the usefulness of refugee groups to other actors, it remains to be seen whether the inviolable character of refugee camps will be respected and whether this formula for access goes far enough to ensure such access.

"Refugees are now frequently viewed as legitimate tools for the advancement of state policies". (UNHCR 1986) However, this destructive and selfish exploitation of refugees threatens the credibility of the principle of separation, which is the basis for the international community's support for protection and assistance to genuine refugees. "This principle has been battered from Honduras to Pakistan to Thailand, primarily due to pressure from major powers such as the United States". (Clark 1987, 33)

Deterrence

When Ronald Reagan accepted the Republican presidential nomination in 1980 he stated:

> Can we doubt that only a divine providence placed this land, this island of freedom, here as a refuge for all those people in the world who yearn to breathe freely—Jews and Christians, those beyond the Iron Curtain, the boat people of Southeast Asia, Cubans, Haitians, the victims of drought and famine in Africa, the freedom fighters of Afghanistan.

The "island of freedom" is still here, but now under President Reagan's administration Haitians seeking refuge are interdicted by the U.S. Coast Guard, and "the freedom fighters of Afghanistan" who "yearn to breathe freely" are likely to be detained—imprisoned—for months or years with other refugees and asylum-seekers. Helton (1987) quotes one eloquent Afghan refugee who had been in detention in New York for six months:

> From this jail and the mental torture I have been put through, it has become clear to me that what I had heard . . . is not anything other than a dream and propaganda . . . . Since there is no hope for me here, I give up my case and request that I be sent back to our beloved country under the Russian torture . . . . Before I die, I will tell them that there is no hope for their safety and that it would be better to be killed by the Russians before leaving

> the country and coming to a foreign land where they will face jail, torture and be treated like animals.

Although they certainly would deny it, U.S. officials have achieved their goal with the Afghan refugee just quoted. His words of despair would be words of deterrence to fellow Afghan refugees: Remain in India, Pakistan, Iran. Don't go to America.

The most shameful protection issue of the 1980s is the widespread deterrence of refugees and asylum-seekers by means of minimal adherence to international standards of treatment for refugees. This issue is not an American problem or limited to the developed countries; it is global. Its symbols are the Orderly Departure Program[5] from Vietnam, the "closed camps" of Hong Kong, the practice of austere "humane deterrence" in Thailand, interdiction off the coast of Haiti, and widespread protracted detention of refugees and asylum-seekers in Europe and the United States.

The goal of deterrence is to keep refugees away, to persuade them to stay home or to go elsewhere. Deterrence is a response to a refugee flow that is believed to be out of control. Hong Kong closed its camps – the refugees are not allowed the freedom of movement or employment that was available to earlier arrivals – when resettlement opportunities declined. Thailand resorted to "humane deterrence" under austere conditions because of concern that well-functioning refugee camps and an efficient resettlement system were acting as a magnet drawing refugees out of Indochina. Interdiction supposedly turns away no genuine Haitian refugees but has cut off a flow of economic migrants. Protracted detention and denial of work permits is a reaction to asylum-seekers whose claims are seen as abusive or fraudulent and to "the growing phenomenon of refugees moving from countries where they have already received protection but are unable to find a durable solution in order to seek 'asylum' elsewhere". (UNHCR 1986)

What these deterrence programs have in common is a minimal adherence to international standards of treatment of refugees. Many, of course, believe that this minimum is sub-standard and a violation of human rights and domestic and international law.

States have very few obligations with regard to refugee protection. Almost all protection and assistance provided to refugees is voluntary, *ex gratia* and discretionary. Approximately 104 countries have signed either the 1951 United Nations Convention Relating to the Status of Refugees or its 1967 Protocol. Neither treaty obligates any state to resettle refugees or to grant them asylum. The primary protection found in the treaties is Article 33 of the Convention, which provides for *non-refoulement* of refugees: no state

"shall expell or return [*refouler*] a refugee . . . to the frontiers of territories where his life or freedom would be threatened."

The principle of *non-refoulement* has achieved mandatory status as part of general international law (Goodwin-Gill 1983) and it thus binds all states, whether or not they are signatories to the refugee treaties. However, states practising deterrence have not found the principle to be a major obstacle.

> States may deny admission to bona fide asylum-seekers in ways not obviously amounting to a breach of the principle. For example, stowaways and refugees rescued at sea may be refused entry; refugee boats may be towed back out to sea and advised to sail on; or military operations may render border crossing too dangerous to contemplate. (Goodwin-Gill 1983, 84)

Harsh, austere camps, detention and even deportation to countries other than the refugee's place of origin do not violate the principle of *non-refoulement*. Similarly, visa requirements and other measures that prevent asylum-seekers from ever reaching one's borders do not violate the principle.

Western conservatives often complain that the United States and its allies are held to a higher human rights standard than the Soviet Union because more is expected of the Western democracies. I would argue that the same holds true for North America and Western Europe with regard to protection of and asylum for refugees. Our democratic heritage requires that we be generous, decent, humane to those fleeing tyranny, to those who, in President Reagan's words, "yearn to breathe freely". It is clear, however, that despite our self-congratulation on being democracies, we fail to reach any higher standard of refugee treatment. Contrast detention with Goodwin-Gill's (1987) words:

> Next to life itself, liberty of the person and freedom of movement are among the most precious of human rights, intimately linked to the general notion of liberty as autonomy or self-government, and of responsibility for oneself.

Indeed, not only is our behaviour a poor example for the rest of the world, it is outstripped by many states that are recently formed, impoverished, and that do not follow democratic principles. Is the West really comfortable in the company of Thailand, Djibouti, and Japan – states that reject or *refoule* or do not accept refugees – while

we fall short of the achievements of Tanzania, Malawi, Sudan, Pakistan, and others that shoulder incredible refugee burdens?

Deterrence is shameful and deeply troubling because it does not reduce the number of refugees, it just increases the difficulties and danger they face. Refugee status begins with persecution, political controversy, danger, and intolerable conditions. It begins with flight and the crossing of an international boundary in search of safety. It is important to recall that being a refugee does not begin with the findings of an immigration officer or asylum judge. Their actions are merely declaratory, recognizing a status that already exists.

Legal Procedures

Deterrence has been resorted to in the developed countries because their legal systems have been unable to deal equitably and expeditiously with genuine and fraudulent refugee claims. Briefly, these legal systems, and the political systems they support, have been unable to deal with the problems of refugee claimants who do not fit the classic definition; refugees exercising "freedom of choice" to move to another asylum country where they may have better prospects of a durable solution; issues of fairness and favouritism; and the magnet effect of a failure to deport rejected applicants.

Western asylum determination systems have been battered and overwhelmed in the last decade by a large increase in the number of genuine and fraudulent asylum claimants. Almost all of these claimants are from the Third World.[6] In many cases the claimants may fit within UNHCR's expanded mandate but not fit the classic definition's requirement of an individual fear of persecution. They are fleeing from general conflict and danger but not a specific threat aimed at them. Many others, however, are economic migrants using the asylum system to circumvent immigration controls.[7] Applicants abusing the system do not even have to hope to be granted asylum. For their economic purposes, long appeals and avoiding deportation are sufficient.

Third World refugees fleeing from political persecution in societies that are also economically troubled are especially susceptible to the suspicion that they are frauds. This suspicion can be even stronger when the refugee flow is mixed into a prior flow of economic migrants.

An added complication is the presence of refugees who have left their countries of first asylum, where often no durable solution is available to them, to seek asylum in a developed country. Article 31 of the Refugee Convention directs states not to penalize refugees "coming directly from a territory where their life or freedom was threatened." Many refugees who try to exercise freedom of choice

have their asylum request denied on discretionary grounds and are put into detention.

The greatest problem with refugee determination is the blatant unfairness and favouritism that is practised with regard to different groups of claimants. There is "a degree of selectivity in refugee recognition . . . that borders on the discriminatory". (UNHCR 1987a) Certain groups have little difficulty gaining admission while others would require a note from their dictator to satisfy dubious examiners.[8] The United States has jailed Afghan refugees, who exercised freedom of choice in coming from India, while competing actively with Israel for Soviet Jewish refugees on the basis of protecting their freedom of choice. Numerous court decisions have found major aspects of the American asylum program to be discriminatory with regard to certain refugee groups, most notably Haitians and Salvadorans. (Zucker and Zucker 1987) Many critics believe that foreign policy factors, not the individual merits of the case, dominate asylum hearings. (Leoscher and Scanlan 1986) In Europe a xenophobic rejection of non-European applicants has been a major problem for years. (Melander 1986)

The blatant favouritism and unfairness in the United States and some European asylum determinations have contributed to the large backlog of asylum cases and the clogging of legal and administrative systems. Humanitarian and human rights organizations and groups of lawyers have mounted challenge after challenge to unfair government policies that "sacrifice fair adjudication for an expedited processing of claims". (Aleinikoff 1984) The results have often left governments in a worsened position; enjoined from using unfair procedures, confronted by a mobilized and suspicious legal community, and forced to re-hear numerous cases. One can only wonder what would have been the result if governments a decade ago had allocated sufficient resources to hearing asylum claims instead of trying to cut corners and if claimants had received fair hearings.

Nonetheless, with all these problems it appears that few rejected asylum-seekers, whether genuine or fraudulent, are deported. Overworked and underfunded immigration officials are unable to keep up with the workload. Although one might argue that this grey status provides safety, it is intolerable for two reasons. First, it creates a sub-group within society, such as Salvadorans in the United States and Tamils and Turks in much of Europe, open to abuse and exploitation. It also creates pressure for more restrictive and deterrent measures, including visa restrictions, penalties on carriers, detention of asylum-seekers, that could ultimately harm numerous genuine refugees.

Voluntary Repatriation

There is a worry that low-income hosts of non-classic refugees who were welcomed on a temporary basis but have no durable solution in sight might turn to voluntary repatriation to relieve their burdens and frustration. Voluntary repatriation is the ideal solution to a refugee problem. The refugee re-integrates into his own society. However, it is a very difficult solution to achieve. Trifles do not cause people to abandon their homes and their lives, and refugees cannot easily go home unless there have been substantial changes in the conditions that caused flight. There are great protection concerns when refugees return to an area where before they had been in danger.

In recent years there have been several repatriations that had very worrying features. In early 1986 almost 60,000 Ugandans fled back to their homeland from southern Sudan after their settlements were attacked by local rebel forces. In 1983 the return of 32,000 Ethiopians from Djibouti took place in a pressured atmosphere that led many to question whether the repatriation was in fact voluntary. (Crisp 1984) "In the case of the repatriation of Ugandan refugees from Rwanda, the alleged coercion, while of a less severe nature, was said to include the pulling down of some refugees' tents and the threatened ending of food rations". (Clark 1987)

There is a fear that countries of asylum may threaten or pressure refugees to return home by altering their levels of assistance, reviewing their status as refugees, or by means of "more subtle forms of pressure in the form of extensive and unwarranted publicity campaigns in favor of voluntary repatriation". (UNHCR 1987a) In 1986 Djibouti was dissuaded from moving refugees to a new "humane deterrence" camp at Obock "in an area that is harsh even by Djibouti standards". (Clark 1987)

Besides ensuring that a return is voluntary, free from constraint and based on full information, there is concern with regard to the monitoring of a repatriation. Independent observers are needed at assembly and crossing points as well as within the homeland. UNHCR has asserted that it has a legitimate interest in monitoring fulfillment of any agreements for return of refugees.

It is far more problematic to ensure safe returns in spontaneous voluntary repatriation movements. In these cases refugees move without international involvement and assistance. In some cases they return to areas in their country of origin that are controlled by so-called "non-recognized entities", which can range from a government in full but disputed control of its territory but denied international recognition (such as Kampuchea) to a guerrilla force in a long-term struggle that may have control of a varying "liberated" area such as in Tigray. Spontaneous repatriations need to be examined carefully for

elements of coercion or danger. It is conceivable that spontaneous returnees could be relying on false or self-serving information, perhaps from a liberation movement wanting the return of its "people", or be returning in haste without due consideration of the risks.

> Voluntary repatriation requires care in implementation on the part of UNHCR and the international community. Both UNHCR and countries of asylum have a legitimate interest in the consequences of return. Unless properly implemented, voluntary repatriation programmes may give rise to serious protection problems for returning refugees. (UNHCR 1987a)

Conclusion

International protection of refugees is constrained and endangered by the failure to find durable solutions in protracted refugee situations; by the "gap between the institutional responsibilities entrusted to UNHCR by the international community and, in particular, the often limited obligations formally accepted by states", (UNHCR 1987a) especially with regard to non-classic refugees; and by the violation of human rights and refugee rights inherent in deterrence and minimum standards programs aimed at refugees.

What is to be done? I have tried to show that the protection of refugees is connected to several background factors in the international arena. Some of these factors may be amenable to action. In particular, I believe that durable solutions can be promoted more effectively; that greater refugee integration is possible; and that states may be persuaded that their self-interest can be served by co-operation and solidarity on behalf of refugees.

An impression that there is no end and no solution to the refugee problem can only promote despair and "compassion fatigue". Refugees consigned to the limbo of extended temporary asylum for decades or generations are poorly served. Without providing an extended analysis at this late stage in this paper, I would suggest that several things can be done to promote durable solutions.

First of all, the developed countries of Western Europe and Japan can do far more for refugees. They can provide a great deal more money and they can begin to establish major ongoing resettlement programs. Resettlement is the maligned durable solution, labelled as the "least desirable and most costly", (UNHCR 1984a) reserved "as an exceptional measure to be pursued only for compelling humanitarian reasons". (US 1984) But the truth of the matter is that resettlement works. It protects refugees, it integrates

them; resettlement has been a true and effective durable solution for more than a million refugees in the last decade. The five traditional resettlement countries – United States, Canada, France, Australia, New Zealand – can do more (just compare our present flows to our recent peaks), but the Europeans have virtually begged off by claiming not to be countries of immigration. In fact they are countries of immigration and diverse societies, and it is time for them to resettle refugees. Only about 1 per cent of all refugees are resettled each year; that ought to increase to 5 per cent for at least a decade. It is not cheap and it is not easy, but considering the burden on the low-income countries, can we do less?

Despite the protection worries already expressed, there is a need actively to explore the promotion of voluntary repatriation. In many cases where refugees have fled from conflict and turmoil there has been no breach of the bond between the refugees and their government. The government may be unable to protect them but it is not unwilling. Efforts to end the destabilization of countries such as Angola and Mozambique could bring benefits. Also useful would be efforts to reverse the polarity of the magnet effect by providing aid in the country of origin that might draw the refugees home.

Low-income countries have carried an immense refugee burden for a long time. Nonetheless, there is more that they can do. Too many refugees are kept in a protracted temporary asylum condition. A major effort is needed to promote the naturalization and integration of long-staying refugees. Many are permanent residents in fact but not law. At some point, be it five or ten years into an exodus, citizenship and full rights should be provided. Such an integration effort is likely to require a major educational program to inform both hosts and refugees of the meaning of nationality and citizenship. Taking a new citizenship does not mean abandoning one's cause, but it recognizes that "next year in . . ." may be delayed.

Lastly, international co-operation and burden-sharing must be expanded and supported. Too much of what passes for refugee policy involves buck-passing and finger-pointing. When the United States tightened its immigration law in November 1986, Canada received a flood of asylum applicants, primarily Latin Americans who would not qualify for the U.S. amnesty program. (Canada 1987; Esper 1987) Developing countries are urged to be more generous by developed countries that practise deterrence and provide meager assistance. Unilateral deterrence pushes the problem onto a neighbour. Norway's asylum case load increased from 300 in 1984 to an expected 8,000 this year because of "a flow of asylum seekers who have been 'diverted' from neighbouring countries which closed their borders". (Crisp 1987) The restrictions and buck-passing have not stopped the flow of asylum-seekers, and the crisis is growing. Only measures that

address root causes and thus avoid the creation of refugees, together with durable solutions that reduce the number of refugees, can lessen the crisis. It is time to try co-operation for the benefit of the refugees. "States' national interests and international objectives will best be served by co-operation, in ways which ensure long-term respect for the basic human rights of refugees and the integrity of the existing system of protection and assistance". (UNHCR 1987)

Notes

1. Because the theme of this conference is "International Protection of Refugees", I have largely excluded the problems of internally displaced persons from consideration in this paper. Although it is difficult to know exactly how many people are internally displaced within their conflict-ridden homelands, the numbers are huge, several millions at least, and many victims are in more desperate circumstances than those who have been able to cross an international boundary (Brennan 1987). The internally displaced are poorly served by an international system of sovereign nation-states that permits the use of force for selfish interests but prohibits humanitarian intervention even in genocidal situations. An interesting breach of these norms occurred in the summer of 1987 when India air-dropped supplies to Tamils in Sri Lanka over the protests of the Sri Lankan Government.

2. The number of refugees in the world is difficult to count because of multiple definitions (see below), political factors, their location in inaccessible regions, high volatility over time, and many other factors. The U.S. Committee for Refugees (1987, 37) reported 11,698,000 refugees in 1986. The United States Department of State (1987, 57) counted 11,229,100 refugees in early 1987. Both figures included only refugees in need of international protection and assistance. Using somewhat broader criteria, for example, counting refugees already resettled in developed countries, the United Nations High Commissioner for Refugees listed 12,217,900 refugees in 1987 (UNHCR 1987, 24-25). However its total excluded 2,150,000 Palestinian refugees who are outside of UNHCR's mandate. Further, UNHCR did not count approximately 260,000 Khmer refugees in camps on the Thailand-Cambodia border.

3. *Statute of the Office of the United Nations High Commissioner for Refugees*, General Assembly Resolution 428(v) of 14 December 1950.

4. UNHCR's inability to establish an international presence, even in refugee facilities that it funds, dramatically indicates a fundamental weakness in international protection that goes beyond the issue of attacks on refugees. UNHCR can pressure, persuade and embarrass governments into giving it access to refugee groups in need of protection and assistance, but it cannot demand access. If governments wish to deny the existence of refugees or admit their existence but deny access, UNHCR is virtually helpless. It can plan, prepare, alert, and protest, but it cannot act within a sanctuary without an invitation from the government. (Winter 1986; Cerquone 1987)

5. The Orderly Departure Program (ODP) has brought some 60,000 refugees and their families safely out of Vietnam. However, the program got its start from a desire on the part of the international community to control and manage the disorderly and dangerous flight of boat people from Vietnam in 1979. Most efforts to control refugee flows stem from a desire to reduce the inconvenience and mess to hosts and donors rather than from first priority being given to refugee protection. Refugee flows are inherently messy and inconvenient. They don't always occur when hosts have labour shortages and donors have booming economies. Efforts to control and manage exoduses can deny protection to some refugees and prolong the agony for others.

6. Although the problem has reached crisis proportions in the 1980s, it dates back to the 1960s (see Paludan 1974).

7. The number of fraudulent asylum-seekers is subject to dispute. Governments rejecting most claimants from low-income countries or from their allies or clients indicate the number is large and increasing. However, Aleinikoff (1984) noted that in the United States "the vast bulk of pending claims are filed by aliens from countries where persecution is a realistic possibility .... If the asylum process were being overwhelmed by 'economic migrants', one might expect the source countries of aliens filing claims to be quite different.

8. Paludan (1981, 70) notes with regard to refugees in Europe that "The asylum-seekers' credibility is questioned almost *a priori*;

they are rarely given the benefit of the doubt, and in practice they carry the 'burden of proof'."

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Obligation and Refugees

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This paper raises the question of the basic principles for determining the state's obligations to refugees and, more specifically, the obligation of the state to grant the right to membership to a refugee who arrives at the border of that state to claim protection from that state.

Part I differentiates the macrocommunities to which individuals belong in the modern world – the state, civil (economic) society, and the nation. It depicts the proper role of the state as adjudicating between the economic and nationalistic sectors without becoming the prisoner of either. The section distinguishes between the ways these macrocommunities grant membership to their respective members. Part I endorses Michael Walzer's thesis that a primary expression of distributive justice is the granting of membership in the state. We argue that granting such membership by right to refugees is a litmus test of the principles of distributive justice underlying any particular state.

Part II then relates those various communities in different ways according to their different ideologies and philosophies. Only small-L liberal states are found to experience any sense of obligation toward refugees.

Part III then relates the different ideologies and political philosophies to the different principles of justice underlying them and,

in particular, the expression of those principles in the obligation to refugees. Though extremist ideologies, with the exception of the anarchists or international humanists, have no obligations to refugees, given their underlying principles of justice, when we begin with the principles of justice and apply them back to the philosophically small-L liberal states in Part IV, no clear guidelines for assisting refugees result; the results are ambiguous.

Part V examines that ambiguity. We argue that, although there are no *clear* abstract principles from which to deduce a state's obligations to refugees, particularly granting refugees the *right* to claim membership in a state (since the determination is a matter of weighing conflicting principles and assessing the alternative implications), the present situation in weighing and applying those conflicting principles favours granting the right to refugees to claim membership in one's own state on the most generous basis.

I. Macrocommunities and Distributive Justice

> The primary good that we distribute to one another is membership in some human community. And what we do with regard to membership structures all our other distributive choices. (Walzer 1983, 31)

The human community at issue for refugees is the political community known as the state. Participation in other political communities within the state – political parties, states or provinces, cities – or participation in non-political communities, depends on having membership in a state.

The political community can be differentiated from another macrocommunity – the nation. The state and the nation generally have a large overlap in membership, but they are not identical. Being and experiencing oneself as an American is not identical with being an American citizen. An immigrant who has just received his or her citizenship papers is likely to feel more Russian or Mexican or Italian than American. A new Canadian citizen living in Quebec and even speaking French is unlikely to experience him or herself as Québécois. An American who defects to the Soviet Union may give up his citizenship – his membership in the state – but is unlikely to have surrendered his feeling and identity as an American.

Membership in the political community of the state and membership in the national community are not identical in timing, experience, the mode of acquisition, the requisite conditions, rites of passage and the agents who make the determination. The conditions

for membership in a nation are usually much more lengthy and subtle than the conditions for membership in a state.

Membership in the political community known as the state may also be distinguished from membership in the civil (i.e., the economic) society. In the modern world, in many areas of economic exchange of goods and services, membership in the political community is generally not a prerequisite to membership in the civil society.*

The reason for commenting on membership in the national community and membership in the civil society is that each of these influences but does not control the conditions for membership in the political community. The ability to assimilate into the national community and the local need for the skills and capital one brings to participation in the civil society are usually factors taken into account in considering applications for membership in the political community.

The influence of these two factors is greatly diminished in the case of refugees who wish to become members of the political community. Thus, the conditions for admitting refugees to membership in the political community provide a litmus test for the sense of justice for that political community, first, because we can more easily separate the factors for admission from the conditions of entry into the civil society and the nation and, second, because the refugee lacks membership in any political community or has been the victim of injustice from the political community from which he or she fled. It is the treatment accorded the stranger – the individual with whom we do not share an immediate sense of actual or potential economic or national community – that provides a key to the principles of justice of the political community.

Walzer argues that membership in the political community is the primary good we distribute because the distribution of membership in the political community governs all our other distributive choices. To restate this in a more qualified way, membership in some political community on the level of a state – that is, citizenship – is at least *a* primary good, because without citizenship in some state our participation in other distributive choices will be severely limited.

Since control over access to a place to live is a monopoly of the state, and the territories of the world have been more or less divided up among states so that, unlike during the nineteenth century, there are no lands to which we can flee that are not under the political jurisdiction of some state, control over living in a territory is also a

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* Some professions and some state positions may require citizenship (membership in the macrocommunity of the state) as a prerequisite for holding such positions.

monopoly of the state. Further, it is a monopoly with a highly centralized decision-making structure – in contrast to membership in a nation, which rarely has a monopoly or absolute control over a territory and where the conditions for membership are frequently very amorphous and decision making is generally decentralized.

Because we start with a world divided into political communities, each controlling a territorial base and entry to that territory, membership in some state is almost a necessary condition for participation in the economic community. The criteria for distributing membership in those political communities are thus crucial to economic survival and success. Further, refugees are the direct by-product of the exhaustive division of the world into political communities that have developed the technological and bureaucratic means – passports, border controls, visas, etc. – to govern access to their territorial bases.

As Michael Marrus makes clear in his book, *The Unwanted* (1985), the twentieth century is the era of refugees formed because of the power of political communities – the power gone awry in those political communities that produce refugees, and the power and sense of justice of those communities open to receiving refugees. Refugees are subject to the choices and power of other political communities that have realized a higher sense of justice, one that extends beyond its own members to strangers who are the victims of other political communities.

The major reasons for that power going awry in political communities that produce refugees in the contemporary world are generally that one national community seeks or gains a monopoly control over the political community and attempts to identify or equate membership in the political community with membership in the national community, or that a community sharing an ideology about the civil society attempts or acquires a monopoly control over the political community and drives out members who resist or do not share that ideology of (centralized or decentralized) control over the economy. (There are, of course, some refugees who are simply the product of small groups that seize power without equating that power with nationalism or economic state control.)

I have therefore defined political community as having a higher sense of justice when its monopoly control over territory is not itself subject to the monopoly control of one nation constituting the dominant or a dominant element in the political community, or of one political faction with a belief in the monopoly control of the state by members sharing one ideology of centralized control over the civil society. In other words, membership in a political community must be a *primary* and not a secondary good to membership in a nation or membership in a civil society.

This does not mean membership in the political community is *the* primary good. A higher sense of justice depends on preventing a monopoly control over justice by any of the macrocommunities to which we belong – states, nations and civil societies. Some elaboration on the difference between political, national and economic communities is necessary to clarify this point.

Membership in a national community exists to advance the spiritual development of the individual, which in turn can grow only to the extent that the national community has a rich culture, history and language. Membership in an economic community exists to advance the material development of the individuals, which in turn can grow for most members only to the extent that the economic life of the community is flourishing. Membership in a political community exists not for itself (unlike Aristotle, I do not define man as primarily a political animal), but to allow the spiritual and material advancement of the individual, that is, to allow the national culture or cultures and the economic life of the people to grow and develop. The political community, though unlike the national and economic life of the nation in not being an end in itself, is a primary good because it exists to separate and mediate between the spiritual and material lives of individuals through the means brought to enhance both the life of the nation and the prosperity of the civil society.

The state may have a monopoly over access to the territory, but an attachment to and the development of that territory is crucial for the enhancement of the national spirit and the economic prosperity of the community. For that reason, it is clear why the civil society and the dominant nations of the state will vie for influence over and upon the state.

But influence should not be translated into control. While the national community operates primarily by means of intellectual influence – the influence of ideas – and the economic community operates by means of monetary influence – the influence of material wealth – it is crucial that influence not be translated into power, for the political community retains a monopoly on the control and use of coercive power to *protect* its members. Generally, when one nation gains a monopoly control over the political state, or when one group with a shared *ideology* about the economy gains a monopoly control over the political state, the state's monopoly on coercive power may be used to persecute the members of other nations or members of the state who hold different materialist ideologies and practices. That is why it is important to separate the coercive power of the state from the creative power vested in the national and economic communities of a society, even though the political community exists to enhance the creative energy in both the spiritual and the material lives of its members.

This is also why formal authority over admission to membership into the political community must remain a monopoly of the political community and must not be subject to the control of either the national or the economic community. Each of these will have its own mechanisms, which will generally not be highly formalized, for participation and, more important, for determining which members have the highest degree of authentic authority in influencing and affecting the life of the nation and the prosperity of the economic community. At the same time, the primary responsibility of the political community will *not* be to decide who should be the leaders within the national and economic communities.

What I have argued for here is the modern version of the separation of church and state, the separation of nation and society by means of the state, which in turn must remain distinct from both the nation and the society it is set up to protect. Membership in the political community is a primary good, and the conditions for membership offered to refugees is the litmus test of the principles of justice of a particular state. Membership in the macrocommunity of the state is also an important and necessary condition of membership in an economic community and of full participation in the nation or nations that dominate the political state and that the political state is, in part, constituted to enhance.

II. Political Philosophy and Principles of Justice

A political philosophy is a theory of the state, which, in modern terms, attempts to resolve the tensions between nationalistic aspirations and individual economic self-interest. An ideology can be distinguished from a political philosophy, for it has an exclusive reference to either an economic community or a national one. A political philosophy addresses itself to the role of the state *vis-à-vis* both the national and the economic community.

Two opposing economic ideologies are libertarianism and socialism or, in popular terminology, capitalism and communism. Two opposing nationalist ideologies are the untra-nationalist perspective – the state is the *sole* instrument for controlling and enhancing the spirit of the nation, and all members of the state must be members of the singular nation that state exists to enhance – and the extreme anti-nationalist, usually internationalist, ideology, which holds that the state should have no role in supporting a nationalist spirit. If the state has any role in promoting a spirit it should be a universalist or internationalist one. To that end, the less the state is dominated by a dominant national community, the better.

Clear examples of political philosophy are fascism and communism. A fascist political philosophy is correctly referred to as

national socialism because it combines an extreme ultra-nationalist ideology with (usually) a less extreme but nevertheless socialist economic ideology. A communist political philosophy, in its purest form, combines an extreme internationalist and anti-nationalist ideology with a socialist economic ideology.

It should be clear from this scheme that it is the authoritarian and totalitarian political philosophies, which push the identification of the state with either the nation (fascism) or the economy (communism), that are significant producers of refugees. It should also be clear that neither anarchists, who deny the nationalistic spirit and the role of the state (and who therefore advocate a totally open door to refugees), nor libertarians, who limit the role of the state in civil society while wrapping themselves in the national flag, can or will do much to create effective state laws to help refugees – the former because of indifference to the state, the latter because of indifference to anything but the economic life of the individual independent of state control.

In the scheme of political ideologies and philosophies set out below, it is only the moderate mediating philosophies that do not produce refugees and that strive to achieve some form of justice in their treatment of refugees. The reasons for this are clarified in the next section.

This schema summarizes the outline of political ideologies and philosophies set out in this paper.

	Internationalism	
Communism		Anarchism
	Social Democratic	
Socialism	Liberal Democratic	Capitalism
	Democratic Conservatism	
	Republicanism	
Fascism		Libertarianism
	Nationalism	

III. Political Philosophies and Obligations to Refugees

Each political philosophy has its own principle of justice. In communism, self-interest is, in effect, totally converted into self-sacrifice. One sacrifices one's own self-interest for the good of the party and for the international proletariat. Refugees are primary agents for self-sacrifice for the communist cause because they have so little to lose and are so clearly victims of the nation-state system. Further, assisting refugees in general would simply be alleviating

pressures on the weak points in the enemy camp (excluding taking in defectors).

This is true of the extreme forms of fascism represented by the nationalist-socialism of Hitler's Germany – the Nazis. Here, again, self-interest became totally sacrificed to a philosophy of self-sacrifice to what the party (and Hitler) defined as the greater good of Germany. Extremist nationalist forces concerned with enhancing and keeping the vital spirit of the language, culture and character of the nation pure from external corruption will resist immigration and the granting of membership in the state to strangers because they are strangers or will impose severe restrictions on the process.

The principle underlying a libertarian ideology is individual self-interest. According to this philosophical premise, each individual seeks to secure and, if possible, expand his own material welfare. In a libertarian ideology, the individual either lives in a state that can provide protection for him or he lives in a potential or actual state of war with no security for his person or his property. (The inability of the Lebanese to develop such a state means that its citizens and residents are constantly subject to arbitrary death, as was the case in the factious isle of Britain in the sixteenth and seventeenth centuries and in some of the slums of the United States of America today.)

The fact is that a state based on a libertarian ideology has no obligation whatsoever to protect non-citizens, but every obligation to its own citizens to permit entry of the best and most talented people cast adrift from other states, particularly from states advocating the very opposite ideology. Extremist libertarians will resist laws to assist refugees because the economic self-interest of existing members is the prime concern.

The philosophies that seem strongest on the concept of taking in refugees are the anarchists or universalists who celebrate the opportunity to break down particularist barriers in the name of an *ideal* of a world community, of humanity, men and women everywhere. It is a paradox that a main force pushing for laws that extend rights and guarantees to refugees are universalist humanitarians, who not only do not ascribe much value to a particularist nationalist spirit, but frequently associate that anti-nationalism with anti-statism while they argue for an enhancement of the state role when it comes to the protection of refugees. But they really argue for the protection of refugees as a corollary of their belief in the free flow of individuals. The internationalist humanists are also at the forefront of those offering and pushing for enhanced aid to refugees abroad.

Those who have to wrestle with how they fulfil their obligation to refugees are not the communists, fascists or libertarians, who have little interest in refugees, nor anarchists and international

humanitarians, who have a total commitment to refugees, but small-L liberals of various stripes who have to balance their concern for self-interest with their humanitarian obligations, their nationalism with their internationalism.

IV. Fulfilling the Obligation to Refugees

Four options are available for expressing one's obligations to refugees: (1) facilitating repatriation; (2) overseas aid in countries of first asylum; (3) overseas selection for resettlement in third countries; and (4) granting rights to claim refugee status to spontaneous arrivals. The first priority is usually to assist refugees to be repatriated to the countries from which they fled. However, as long as political communities are more dedicated to injustice than to justice, repatriation will be ruled out. Yet it is the one option that all ideologies would support if the regime from which people fled changed.

Unfortunately, repatriation is not always voluntary. It is sometimes forced. After World War II, in concurrence with the terms of the Potsdam Agreement, literally millions of Eastern Europeans were forced to return to the control of the Soviet system and to face death at the hands of Stalin and his henchmen. When nationalists and libertarians were caught up in their own nation's concerns and the restoration of their own economies and wanted to save their own youthful members from sacrifice in a new war – particularly after so many lives had been sacrificed in one so recently concluded – they might have been quite willing to sacrifice the lives of others to whom they felt no obligation.

The other three options offer more hope as expressions of obligation toward refugees. Political communities may offer a portion of the goods and services they produce to help settle the refugees in the first country of asylum, usually a country adjacent to the one the victims fled, at least until conditions are ripe for voluntary repatriation. Alternatively, political communities committed to a principle of justice can accept refugees as members. There are two alternative paths for carrying out the latter option. Refugees can be accepted for resettlement in a political community by selecting a quota of refugees as immigrants. Or, refugees may land on our doorstep by airplane, boat, car or train, claiming refugee status under the Geneva Convention at the border and asking to be allowed to remain.

Thus, even if it is accepted that political communities committed to a principle of justice have obligations to refugees, for small-L liberal societies, the question of how to adjudicate among the various avenues for fulfilling that obligation remains open. But only one choice is

philosophically fundamental. For when we offer assistance to refugees abroad living near the borders of their homeland, or even when we go to refugee camps abroad to *select* a portion of those refugees for resettlement in our own political community, we retain *absolute* control over the decision as to who can and who cannot become members of our political community while at the same time fulfilling our obligation to refugees.

But when we grant refugees the *right* to claim asylum once they land on our doorstep, we qualify that absolute sovereign control over membership. No club grants anyone a *right* to claim membership, though clubs are under social pressure not to adopt criteria rooted in racism or sexism in selecting their members. Yet countries that have signed the Geneva Convention for Refugees and its subsequent Protocol and have incorporated that obligation into domestic law have indeed accepted an obligation to grant membership by *right* to refugees who qualify under the Geneva Convention, provided they pose no security threat to the host country. However, some – usually those of the libertarian persuasion – interpret that obligation in a negative sense in upholding *non-refoulement* only. That is, refugees must not be sent back to the state that persecuted them, but we have no obligation to accept them in our state.

Thus, the obligation and the granting of rights are themselves qualified. In a modest qualification, we have no obligation to grant membership to an individual who, though he may be a refugee, would be a threat to the stability or security of our political community. Although the litmus test is an obligation to strangers without a political community to guarantee their protection, the obligation does not extend to enemies of the political community. (The ancient Hebrews distinguished between *idolaters*, the essential quality by which they characterized their enemies, including individuals who were already members of the political community, and *strangers*, to whom the Bible enjoins again and again to extend a welcome and helping hand.)

In a *major* qualification, we have no obligation to accept any refugee as a member of our state; our only obligation is not to compound the crime of persecution by returning the refugee to the state from which he fled. In other words, the obligation is so qualified as to effectively undercut it altogether as far as its essence is concerned. In a *modest* qualification, we need not focus on the means of distinguishing between enemies and strangers; we need only recognize that any political community must make such a distinction, though the very necessity to make the distinction is used too frequently as a basis for persecuting members of one's own community – the McCarthy witch hunts, the forcible resettlement of citizens of Japanese descent during World War II in Canada and the

United States, the persecution of dissidents and prisoners of conscience in the Soviet Union, the acts of terror of the Khomeini regime against the Bahai's, for example, and the efforts of Rabbi Meir Kahane to drive the Arabs out of Israel.

Without going into detail, a liberal view restricts the definition of an enemy to those *individuals* who threaten the physical safety and security of other members of the community. Groups as a whole cannot be branded as enemies. Nor can individuals who question and challenge the inherited belief structures that give coherence to the political community. Only those individuals who pose a physical threat can be branded as enemies. Those who risk their material welfare for their abstract beliefs are not enemies; those who are willing to sacrifice the material security of others for their abstract allegiances are enemies.

V. Adjudicating Our Obligations

To decide how to adjudicate among the three options open to us – overseas aid, overseas selection for membership, and granting rights to claim refugee status to Convention refugees (on the modest qualification, for the major qualification grants the right with one hand and takes it away with the other) – in fulfilling our obligations to strangers who are refugees, we must review the influence of the possible principles underlying that obligation.

One possible principle is self-interest, identified with the underlying premise of the civil society when applied to the state. It begins with the Hobbesian premise of the right of every individual to have the security of a place to live where that individual can produce and consume what is necessary to sustain his or her life. The state was created to provide that security – that is, to serve the self-interest of the individuals who are members of that state. Some, however, would go further. When the world is totally divided up into territorial states, and the individual can no longer go outside the system of states to find a secure place where that individual can find what he or she needs to preserve life, then an individual state's obligations to its own citizens extends collectively with those of all other states to stateless individuals.

Further, states will be divided into those that more or less do live up to protecting their own members and providing the security for them to earn the necessities of life, and those that do not provide such protection but abuse the rights of individual citizens. Those that attempt to live up to the principle of justice incumbent on a state to protect its own members therefore have a larger burden of obligation to exemplify that principle by ensuring that protection is accorded to those individuals who flee persecution and lack the protection of any

state. The collective burden-sharing in this respect is but an extension of the rights of individuals to protection and the right to earn the necessities of life.

The argument is often put in a complementary way. There is a fundamental premise – the principle of justice that every individual is entitled to the protection of a state in a territory where he or she can earn the necessities of life. States that share that principle must collectively extend that principle to those who are the victims of states that do not live up to the principle. If they do not accept the principle as a universal obligation, that is, if they do not apply the principle to all mankind, they would not be entitled to claim that belief as a principle of justice. It is precisely by making their particular beliefs a universal obligation of all and to all mankind that self-interest is built into a principle of justice.

A different perspective on the same argument is that it is in the self-interest of states that adopt the duty to protect their individual members to extend that protection to individuals outside the protection of any state, lest these stateless individuals create disorder in their quest for the necessities of life and for protection and thereby threaten the international order. That is, unless states that claim to hold to this principle of justice collectively share the burden of extending that principle to individuals outside the orbit of any state and lacking protection, the situation will tend to destabilize, particularly in those states most vulnerable in their commitment to protecting their own citizens. In sum, self-interest, when combined with its universalization into an abstract principle, dictates an obligation to refugees.

Counterposed to the argument that the obligation to refugees is an extension of the principle of self-interest, is the principle of self-sacrifice. At its limit, self-sacrifice entails the sacrifice of the individual out of universal obligation to all mankind. Some call it charity when the self-sacrifice is limited to a limited portion of one's personal bounty. Rawls and Walzer call their principle *mutual* aid, since the principle of helping strangers *who happen to cross your path* is qualified even further by minimal risk to oneself (1971, 114; 1983, 45). Nevertheless, the principle of self-sacrifice, the principle of charity, and the principle of mutual aid *all* proceed from a source opposite to self-interest – even if self-interest qualifies them to different degrees – the duty to sacrifice self for the benefit of others.

Self-sacrifice is based on a Kantian secular presumption or a Christian religious one as instances that men care and are motivated by goodwill as opposed to a selfish will. And that goodwill obligates us *not* to act out of self-interest, but in service to a universal norm of duty to all men. We extend a helping hand to others in need, not because someday we might be in the same position, or because unless we do,

those not helped may threaten our own security, or because it does not really cost us anything and makes us feel good. We extend aid without any consideration of self-benefit or cost to self, or with qualified consideration of self-benefit and cost, because we are commanded to do so by a universal morality in contradistinction to one built up from the principle of self-interest.

The difficulty with this as a principle of action is that logically it leads to the necessity of a universal coercive order to enforce the principle of justice. For even if individuals are or should be motivated by goodwill, responsibility for providing access to membership in one's political community as a matter of *right* is not an individual choice but one for the state to make. And whether or not individuals are governed by this sense of morality, it is doubtful that states are.

Further, if a state were obligated to a duty to all mankind overriding self-interest, then the primary duty would be to those *most* in need of protection, and those with the will, the ability, and the money to reach the state's borders are not necessarily those most in need.

Thus, the charitable principle is unlikely to determine the obligations of a state. But if it did, then the primary obligation and the litmus test of the justice of the state would not be the treatment of those landing on its borders requesting asylum, but the treatment of those who are in much greater need and lack the means ever to reach one's borders. Further, sending away the stranger seeking asylum in no way prevents you from sending him away with alms or offering to assist elsewhere. In fact, one could argue that the monies spent on any settlement effort would go much further in helping those with greater needs abroad. In other words, the charitable principle could just as well dictate turning away the appeal of the stranger for membership in one's political community.

The self-interest principle could do the same. For example, there is a belief that generous asylum laws create a pull factor that tends to increase the numbers seeking asylum as well as lessen the pressure on those states that fail to protect or that actually persecute their citizens. Further, once strangers are given a *right* to claim membership in one's political community, no bureaucratic system, however cleverly devised, can prevent serious abuse by those with the will and resources to take advantage of such an opportunity and who are desperate to do so, even if it is only to improve their allocation of the goods and services available to them in their own communities. Thus, on the principle of self-interest one could argue that one is obligated seriously to restrict, if not eliminate altogether, any right of a stranger to claim membership in one's own political community.

We can approach the problem from the other end. We can try to understand the rationale for why we should *not* extend protection to

refugees at least as a matter of right and, perhaps, even as a matter of choice, as when we select refugees abroad for resettlement in our own country. Ironically, the rationale for offering alms or charity or aid complements rather than contradicts the rationale for *not* offering membership.

The first issue is one of visibility. As Walzer words the guideline, "Groups of people ought to help necessitous strangers whom they somehow discover in their midst or on their path" (1983, 33). If we help only those whose cases are brought or somehow come to our attention, we do *not* help those whose cases do not. Protection is and should be accorded to those in need who become visible; protection is and should not be accorded to those in need who remain invisible. On the self-interest principle, it is in one's interest to minimize visibility and to maximize invisibility. Further, the recognition of one visible necessitous person in need of protection may bring out others. It is like the man who will not give a ride to a hitchhiker because he is sure that around the corner, behind the sign, or in the ditch lurk numerous others for whom the visible hitchhiker is but a lure. Therefore, one should construct the laws of the state to ensure that as few refugees as possible become visible to one's populace, and if any do, one should act so as to discourage the appearance of any others. Otherwise, as Good Samaritans we will be overwhelmed with claimants.

On the charitable principle, it is imperative that as a universal principle we give as much publicity as possible to the needs of refugees everywhere, even if, for the benefit of supersaturated television audiences, this requires going to remote areas to portray emaciated adults and infants with bloated bodies. This means that refugees from natural disasters exaggerated by political incompetence, abstract ideology, or war get the attention, for it is not possible, by the very nature of the deed, to put on camera the persecution of an individual within another state. We only see that individual when he or she has escaped.

Thus, although the self-interest principle works to keep refugees invisible and the charitable principle to make them visible, both principles in effect conspire to make the refugee remote. The one who claims refugee status by right and lands on your doorstep does not appear necessitous and the one who appears necessitous does not and cannot arrive on your doorstep.

VI. Conclusion

The analysis seems to leave us in a paradoxical situation. The self-interest principle of the civil society, when applied to the state and its obligation to refugees, seems to support the obligation to grant refugees a *right* to claim membership in the state, yet offers

arguments for limiting the application of that right. On the other hand, the principle of self-sacrifice, which is at the basis of the nation as well as other spiritual belief systems, when applied to the state and its obligation to refugees, can be used to support and reinforce that obligation. But it can also be used to argue that the state has a greater obligation to help refugees abroad, given the limited nature of the self-sacrifice in the form of charity that its citizens are willing to make.

One can conclude that the long philosophical excursion provides no guidance as to the principles we ought to use to determine our obligation to refugees. My point in this exercise, however, is to indicate that the state, in undertaking its obligations to refugees – or any other obligation for that matter – does not have pure principles to guide it. The state, and those governing the state, must use judgments in which conflicting principles are at work, and even those different principles can determine opposite outcomes.

In the present circumstances, I would argue as a matter of judgment, and not of deduction from abstract principles, that both self-interest and self-sacrifice favour granting refugees the right to claim the protection of a country in which they find themselves on very fair administrative procedures. The details of this argument for practical, moral and political judgment depends on a much more elaborate discussion of current circumstances.

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Discussion

Discussion following this session centred on four main themes: the need for leadership, the role of academics, the importance of good estimates of refugee populations, and the influence of discrimination against refugees.

A number of speakers were concerned that a lack of leadership in Western countries on the part of governments, church groups and non-governmental organizations (NGOs) had meant that there was not much support for the admission of refugees, especially those from Third World countries. Others stressed that it was important not to rely solely on the UNHCR as the 'keeper of the flame' because otherwise individual states would neglect their responsibilities in this area. Certainly, it was argued, if there is a 'system' of refugee protection then the role of the states must not be overlooked. The solution, as one speaker observed, is to see the roles of the UNHCR and individual states as complementary – indeed, at a time when states are backing away from what have been seen as established principles and practices, it is important that the UNHCR continue to articulate higher standards.

Various solutions to the problems of a lack of leadership were put forward. Notably, it was observed that it is necessary to recognize the intersection between politics and humanitarianism if any action with respect to refugees is to occur. Thus, a strong public humanitarian

impulse is not in itself sufficient to prompt governments to action. There must be a political 'hook' on which to hang humanitarian issues. Thus, public guilt over the Vietnam War, interest in Iran and involvement in Nicaragua have been important in facilitating the admission of refugees from these countries to the United States. The combination of humanitarian and political issues is thus often sufficient to touch a sensitive chord among the public and the politicians. It was also argued that an underlying generosity did exist toward refugees but that a lack of information clouded the public's perception of the problem. In a 1984 survey carried out by the U.S. Committee for Refugees, 91 per cent of Americans surveyed said they did not understand the issues involved or had no interest in them because the issues did not affect them directly. Only 10 per cent connected the concept of persecution with the concept of refugee, and 50 per cent believed refugees were coming mainly from Mexico. On the other hand, when asked what they would do about specific refugee cases if they were immigration officers, the overwhelming majority expressed a desire to admit such individuals. In other words, it appears that there is a generous instinct in our societies but that this instinct is dampened by misinformation. Such generosity must be mobilized by an NGO leadership that not only sets goals that are morally high but also provides the informational tools that prevent generosity being smothered by misinformation.

What role could academics and other observers play in this process? It was noted that it is important for research to examine which solutions are successful in dealing with refugee problems and to expose flawed strategies so that the limitations on what can be achieved are recognized. Thus, for example, it was argued that the United Nations Relief and Works Agency (UNRWA) attempted to deal with the Palestinian refugee problem by economic means, but that this was almost a total failure because UNRWA lacked the power to solve the issues. The lesson is that refugee problems must be dealt with where we have the power to tackle them; this may mean being able to do little until the countries involved are willing to allow help from outside.

Academics must also demonstrate the importance of both reasoning and compassion and must seek to provide practical instruments for remedying refugee problems. Thus, many liberal states are currently reacting defensively because they feel they are receiving the refugee burden of many other states. A new concordance must be reached between such states, and research is necessary to provide the tools to do this. Work is needed to develop new international norms and principles so that burden sharing is not solely voluntary but based on clearly defined obligations; research is required on how such agreements can be strongly defended in the

international arena – perhaps after the manner of the General Agreement on Tariffs and Trade; research is even necessary on how best to revive and incorporate the nineteenth-century consensus about granting asylum to those fleeing persecution. Finally, it was observed that researchers had an important task in clarifying the statistics concerning refugee numbers.

Indeed, this issue provided a third theme in the discussion. Several commentators urged that more details be given when refugee figures are quoted. Thus, of the world's total population of refugees (currently estimated at between 11 and 15 million people), it is important to note that some 5 million are Afghans. A successful peace settlement in Afghanistan could therefore significantly reduce the size of the world's refugee population, as could other regional peace settlements, given that Kampuchea, Mozambique, Angola and Ethiopia are major sources of refugees. Two million of the world's total number of refugees are Palestinians recognized as refugees by UNRWA, yet many of those in Jordan and the West Bank are Jordanian citizens and should not be confused with the 600,000 refugees who are Palestinian and who have no protection at all. Perhaps almost half of the world's refugee population is Islamic – a fact that often escapes note. Moreover, little attention is given to the fact that the recent annual additions to the world's refugee total have been relatively small and that considerable reductions have occurred because of significant amounts of spontaneous voluntary repatriation. Such details are important in fully understanding the issues involved.

Others urged the importance of perspective when considering current totals. Thus, after World War II, West Germany was obliged to repatriate more than 10 million ethnic Germans. During the birth of Bangladesh, 10 million refugees fled to India and then returned during a single year. Such figures, and the knowledge that such numbers have been accommodated in the past, must throw new light on the challenges presented by the current world total. Furthermore, such comparisons indicate that the situation can be a very fluid one, that there is no reason to believe numbers of refugees will increase automatically each year, and that there is a very clear potential for large changes to occur. Finally, some speakers urged caution when using statistics, suggesting that a concern with numbers draws attention away from the need to deal with the problems themselves and provides opponents with an apparent means of demonstrating the difficulties faced because the numbers involved appear so large.

Issues of discrimination occupied many speakers' minds during the discussion. Several commentators observed that racism severely limits the fair operation of Canada's refugee admission programs and suggested that one way to circumvent this problem is to devote more funds to helping refugees in countries of first refuge such as Thailand

or Somalia. Other speakers sought to refine this observation by noting that the major countries of immigration – despite racism within their white communities – have nevertheless admitted thousands of non-whites since 1945 and will continue to do so. Other speakers suggested that Western countries discriminate against peasant refugees and observed that both Canada and the United States favour refugees from Indochina who are from the educated middle classes. In some ways, it was argued, even the operation of other immigration categories impinges on refugees. Restrictive immigration policies prevent immigrants bringing their families into Canada and thus foster antagonism between such groups and legitimate refugees, who are seen as 'queue jumpers' or 'abusers' of the system. Such policies therefore effectively discriminate against legitimate refugees, who face increased difficulty gaining admission. Speakers argued that it is therefore important not to allow immigration policy to dictate refugee policy and to ensure that spontaneous arrivals of refugees, coupled with a fair process of refugee determination, can continue in countries such as Canada.

Of the other issues raised in the discussion the most important concerned the influence of Western Europe and the United States on the formulation of Canada's new refugee legislation. Commentators noted that there were great similarities between this legislation and the approach of the current West German government to the issue. However, it was argued that this should not be surprising because Canada currently sends a representative to the European Community's meetings aimed at harmonizing European legislation on refugee admission by 1991. Others noted that the United States' 1982 endorsement of the 'pull factor' as a cause of refugee movements justified subsequent restrictive American action against refugee admissions, a policy quickly followed by the Europeans and the Canadians – because the new American policy had made such actions appear legitimate. Clearly, speakers urged, such interconnections must be recognized in conjunction with the issues discussed above when attempting to articulate new strategies to deal with the nature of the problem.

III.

Causes of Refugee Problems and the International Response

Some Considerations on the Protection of Refugees in the Inter-American System, with Particular Reference to the Situation of Refugees in Central America

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Any study of the issue of assistance afforded to refugees and displaced persons calls for legal analysis and an evaluation of a reality shaped by political, economic, social, cultural and humanitarian factors. Of these, the juridical framework may seem inadequate by comparison to the magnitude of the problems of the thousands of individuals who cross borders seeking asylum and protection. Nonetheless, the law is an essential instrument for establishing structures and mechanisms suitable for improving the living conditions of refugees.

There are three levels of legal sources that, taken together, constitute the obligations that the States have undertaken to respond to the phenomena of the massive influxes of persons. At the universal level, the status of the refugee is governed by the 1951 Convention Relating to the Status of Refugees (1951 Convention) and its 1967 Protocol, both adopted under the auspices of the United Nations and the 1950 Statute of the Office of the High Commissioner.[1] At the regional level, in the American hemisphere, where asylum developed as an institution of public international law, several treaties apply to the regime of asylees and refugees. Important among these instruments are the Conventions on Diplomatic and Territorial Asylum (1928, 1933, 1939, 1954); the Conventions on Extradition (1933, 1954, 1981); the American Declaration of the Rights and Duties of Man (1948); and the American Convention on Human Rights

(1969). Finally, at the national level, provisions have been adopted in some cases to regulate the institution of refuge. For the most part, however, the laws or regulations enacted to govern the status of aliens are generally applied by analogy to assist the unprotected displaced person.

The foregoing general description of the legal framework of the problem of refugees might convey the impression that by co-ordinating these three sources of law, one has a complete system capable of providing the refugee with effective protection. Nonetheless, there is an inconsistency. The disparity is attributable to the fact that these legal instruments are not in force in all the member States of the international community,[2] and to a situation that, especially in this last decade, has transcended the realm of law. In this respect, the disparity cannot be traced to the intent of States but rather to their inability to honour the commitments that derive from general principles of law.

Protection of the Refugee at the Universal and Regional Levels

A comparison of the general rights and principles upheld in the universal and regional instruments shows that while the 1951 Convention and the 1967 Protocol together constitute an autonomous regime in the universal sphere, the same cannot be said of the inter-American instruments on territorial asylum, human rights and extradition. In order to achieve effective and uniform protection within the inter-American system, the various conventions would have to be combined and all of the member States of the OAS would have to accede to them; something which is not the case at present.

To move in the direction of an integrated and ultimately more elaborate and just inter-American system, the concepts of asylum and refuge must first be reconciled.[3] Another point that deserves special attention is that although the principle of *non-refoulement* is recognized in a number of inter-American instruments, it is not uniformly defined and does not include the principle of no rejection at the border.[4]

Similarly missing in inter-American instruments is the qualification for asylum. Hence, asylee status can be determined only by interpretation of those instruments. In effect, asylum under the inter-American system is based on objective criteria, the presence of a state of actual persecution. There is no provision for the subjective element of a well-founded fear of persecution as in the United Nations system.

It is in response to these considerations, and as part of the co-ordinated work being conducted by the Office of the United Nations

High Commissioner for Refugees and the General Secretariat of the OAS, that the OAS Secretariat for Legal Affairs prepared a study comparing United Nations international instruments and the inter-American system on asylum, refugees and displaced persons.

The study analyzed two alternatives: co-ordinating the American regional instruments and the universal ones; and agreeing upon an inter-American instrument on refugees that is responsive to the situation and legal characteristics of the region.[5] It is obvious both options would require additional effort in the progressive development and codification of international law and would take too long to materialize. That is why the most important conclusions of the study were to encourage those States not parties to the 1951 Convention and its Protocol to accede to those instruments and to endorse the 1981 Plea of the Mexican Colloquium for an instrument within the inter-American system that provides for the protection of displaced persons.[6]

Protection of the Refugee at the National Level

Articles 35 and 36 of the 1951 Convention and Articles II and III of its 1967 Protocol provide for a tacit commitment by States parties to make the necessary changes in their domestic legislation to ensure proper application of the Convention and its Protocol. This is tantamount to an obligation to adjust national laws to international legal norms. Although the same principle is upheld in Articles 2 and 43 of the 1969 American Convention on Human Rights, it is not contemplated in the other American instruments on asylum.

Beginning from the premise that where protection of, and assistance to, refugees is concerned, the national legal framework is conclusive, an examination of the legal status of this category of person within the American states, as determined by their respective domestic legislation, has been regarded as an important goal of the Cooperation Program between the UNHCR and the OAS. Under this program, studies were conducted on the national laws of Argentina, Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, Ecuador, Honduras, Jamaica, Mexico, Nicaragua, Peru, and Venezuela.[7]

In general terms, one can say that the national laws of these American countries are not inconsistent with the principles recognized in the 1951 Convention and its Protocol and in the inter-American conventions on the subject. In many cases, however, it might be better to adopt legal provisions bearing specifically upon refugees. This would lead to the development of juridical structures that can realize the fundamental principles for the protection of

refugees not always contemplated in the traditional framework of asylum.

Only Argentina and Costa Rica have laws that define the category of 'refugee' expressly.[8] The other countries, even those that are parties to the 1951 Convention (e.g., Brazil, Colombia, the Dominican Republic, Jamaica and Nicaragua) have no definition for the term. Consequently, only a few countries have formal procedures for establishing refugee status, and in the majority of cases, refugee status is decided within the broader framework of the procedures provided for the entry of aliens.

As for the principle of *non-refoulement*, which may be incorporated into the domestic legal system by way of the multilateral conventions, Argentina, Brazil, Colombia, the Dominican Republic, Ecuador and Jamaica do not expressly regulate this principle in their domestic legislation. In Bolivia, Honduras, Nicaragua and Venezuela the principle is expressly upheld.[9]

The national laws of the American republics lack specific standards on the treatment of those refugees who have entered illegally. The system in Argentina, Bolivia, the Dominican Republic, Ecuador, Honduras, and Mexico, however, is consistent with the principles of the 1951 Convention. The problem of the individual status of the refugee also poses difficulties because there is no uniformity in Latin America among the domestic laws regarding the application of the two possible criteria: nationality or domicile. Save for Argentina, Costa Rica and Nicaragua,[10] there are no specific regulations concerning the migratory status of refugees. Therefore, as a rule, the norms applied are those adopted for the generic category of aliens.

The inter-American system does not uphold economic, social and cultural rights in an independent convention. This is so, even though Article 43 of the OAS Charter as amended by the Protocol of Buenos Aires provides that the member States of the Organization shall take the necessary measures to ensure that their population enjoys those rights. Instead, in practice and in principle, refugees would be accorded the same rights enjoyed by other aliens.

The Cooperation Agreement between the UNHCR and the OAS places particular emphasis on those problems created in the Central American region by the massive influx of persons and the difficulties that these countries encounter, regardless of whether they are states parties to conventions relating to refugees or other related matters.[11] By way of example, in the next section we summarize certain data concerning the situation of refugees in Costa Rica (a State Party to the 1951 Convention and its Protocol) and Mexico (a country that has not yet acceded to those instruments). The data are derived from OAS

missions in December 1986 and January 1987, which were generously assisted by UNHCR staff in those countries.

The Massive Influx of Persons in Costa Rica

With an area of 50,700 square kilometres and an estimated population of 2,500,000, Costa Rica has recently dealt with a massive influx of migrants, particularly from Nicaragua, as a result of conflicts in the Central American region. Apart from the 32,000 registered refugees, the government of Costa Rica estimates that there are 150,000 who enter and opt to remain illegally and do not file for the migratory status for which they could qualify. By doing so, these persons deny themselves the protection and humanitarian assistance they could receive at centres set up to care for them.[12]

Honouring its tradition of asylum, Costa Rica has accepted the entry and presence of refugees, thus giving a legal and organic response to the problems it faces as a country receiving massive numbers of migrants. In keeping with international commitments undertaken in 1977 when it acceded to the 1951 Convention and its Protocol, Costa Rica has been adopting a series of decrees and decisions to guarantee the refugee a basic system of rights.[13] The entire refugee population has permanent medical services available to it, and literacy programs are run on UNHCR guidelines. Camps have been established to help refugees become self-sufficient through productive farm projects, and some refugees may obtain seasonal work permits. Emergency camps are more crowded, but the presence of social workers eases frictions, and these are not closed camps.

For its part, the UNHCR has worked closely with Costa Rican authorities in dealing with problems associated with the phenomenon of human displacements and has given the government the chance to seek international co-operation to correct economic and technical problems. Each year the United Nations invests nearly $35 million to aid more than 125,000 refugees in Central America and Mexico. In 1986 one-fifth of this budget was earmarked for providing assistance in Costa Rica.

The OAS study indicates that refugee practices in Costa Rica conform to the general principles of the multilateral instruments and that the principle of provisional asylum to deal with the immediate needs of displaced persons is fully observed.[14]

The Massive Influx of Persons in Mexico

In 1981, groups of Guatemalan citizens arrived in Mexico, claiming that they were fleeing violence in their communities. By 1984, the

number of Guatemalan refugees in the state of Chiapas had reached 46,000. In response, the government of Mexico, out of concern for the safety of the refugees and of the local Mexican population, accelerated plans to relocate the refugees far from the border. Between May and November 1984, 11,730 refugees were moved to the state of Campeche and 3,500 to the state of Quintana Roo. By the end of 1986, there were 64 camps left in Chiapas, housing a total of more than 20,468 refugees.

The Mexican government's policy toward the Guatemalan refugees who remained in Chiapas differs from its policy toward those relocated to Campeche and Quintana Roo. In Chiapas, its policy is one of provisional asylum until the refugees decide to repatriate themselves voluntarily to Guatemala or are relocated in other areas of Mexico. In Campeche and Quintana Roo, on the other hand, although the goal of voluntary repatriation is considered the ideal solution, UNHCR and COMAR (the Mexican Refugee Assistance Commission) are conducting programs geared to finding lasting solutions that will enable the refugees to become economically self-sufficient and eventually, in the case of those who do not opt for voluntary repatriation, to be integrated into Mexican society.[15]

The assistance provided by COMAR and the UNHCR in Chiapas is geared to providing the basic essentials: food, housing, health and basic sanitation services. The camps vary in size, facilities and structure. While some are closed, in the sense that they are on common land, others are small groups of houses in Mexican neighbourhoods. Although the refugees do not have legal permits to work, they do engage in some type of work within the area, as seasonal day workers for example. The living conditions of the Guatemalan refugees relocated in Campeche and Quintana Roo, though not without problems, are superior to those in Chiapas. The Government Secretariat allows refugees settled in Campeche and Quintana Roo to work in the areas surrounding the settlements. COMAR serves as a liaison between the employers and refugees to ensure that the Mexican work force is not displaced and that the refugee workers are not exploited in terms of wages.

On the legal front, the demands posed by these refugees go beyond the traditional framework of political asylum applicable in Mexico. The situation has created a sense that this might be the time to review the legal system with a view to developing institutions that provide the authorities with a solution to this long-standing problem and to guarantee the refugees' human rights. To do so, Mexico has at its disposal invaluable sources in international and regional instruments on the issue.

Some Observations on National Legislation

The magnitude of the refugee crisis in the American region calls for a more enlightened legal definition of the beneficiaries of international protection and an assistance program that will ensure basic living conditions for these populations.

At the regional level in the American hemisphere it seems appropriate to study the possibility of adopting certain guidelines for developing a uniform model law, applicable to large-scale displacements of persons, that embraces the fundamental provisions of the subject matter. Those guidelines could include the following elements:

(a) the definition of refugee contained in the OAU Convention, to uphold the most progressive concept of refugee;

(b) the right to refuge as a subjective right of the individual, approaching the topic from a pragmatic standpoint and avoiding theoretical discussion on the legal personality of the individual under contemporary public international law;

(c) upholding the right of *non-refoulement* and the principle of no rejection at the border;

(d) a specific, clear and expeditious procedure for granting refugee status and identification papers; and

(e) the legal consequences attached to the recognition of refugee status (minimum rights and obligations).

These guidelines could be included in a legal instrument concluded by the States of the region in the form of an agreement or declaration. Until such international standards are ratified and implemented at the global or regional level, national legislation will remain the conclusive competence.

Notes

1. The American States Parties to the 1951 Convention or its Protocol are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Jamaica, Nicaragua, Panama, Paraguay, Peru, Suriname, the United States and Uruguay.

2. *Treaty on International Penal Law* (Montevideo, 1889). The Parties are Argentina, Bolivia, Paraguay, Peru and Uruguay.

   Convention on Private International Law (Bustamante Code, Havana, 1928). The Parties are Bolivia, Brazil, Chile, Costa

Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.

Convention on Status of Aliens (Havana, 1928). The Parties are Argentina, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Peru, the United States and Uruguay.

Convention on Asylum (Havana, 1928). The Parties are Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay. The Dominican Republic denounced the Convention in 1954. Haiti denounced the Convention in 1967, but withdrew its denunciation in 1974.

Convention on Political Asylum (Montevideo, 1933). The Parties are Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay and Peru. The Dominican Republic denounced this Convention in 1954, as did Haiti in 1967. In 1974, however, Haiti withdrew its denunciation.

Convention on Extradition (Montevideo, 1933). The Parties are Argentina, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States.

Convention on Political Asylum and Refuge (Montevideo, 1939). The Parties are Paraguay and Uruguay.

Convention on Diplomatic Asylum (Caracas, 1954). The Parties are Brazil, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Haiti, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

Convention on Territorial Asylum (Caracas, 1954). The Parties are Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Haiti, Mexico, Panama, Paraguay, Uruguay and Venezuela.

Convention on Human Rights (San José, 1969). The Parties are Argentina, Barbados, Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Suriname, Uruguay and Venezuela.

3. As in the United Nations system, there are documents in the inter-American system that regard asylum or refuge as a human right. This is true of the American Declaration of the Rights and Duties of Man (Article XXVII) and the American Convention on

Human Rights (Article 22.7). There are, however, other instruments that regard asylum as the right of the state, as in the case of the Convention on Diplomatic Asylum (Caracas, 1954) and the Convention on Territorial Asylum (Caracas, 1954).

4. The principle of *non-refoulement*, generally recognized in international law, is established in the following regional instruments within the inter-American system:

   Treaty on Political Asylum and Refuge (Montevideo, 1939, paragraph 2 of Article 12).

   Convention on Diplomatic Asylum (Caracas, 1954, Article 17).

   Convention on Territorial Asylum (Caracas, 1954, Article 3).

   American Convention on Human Rights (San José de Costa Rica, 1969, Article 22.8). The formulation of the principle of *non-refoulement* is neither standard nor absolute in the inter-American system, except in the case of the American Convention on Human Rights (Article 22.8). Moreover, inter-American instruments on territorial asylum (the 1939 Treaty, the 1954 Convention and the American Convention) do not explicitly make *non-rejection at the frontier* an integral part of the principle of *non-refoulement*.

5. A Study comparing United Nations International Instruments and Inter-American Instruments on Asylum Refugees and Displaced Persons, Ser/Ser.D/5.2, OEA/ACNUR/doc.2, rev.1, General Secretariat, Washington, D.C., 1984.

6. Coloquio sobre el Asilo y la Protección Internacional de Refugiados en América Latina, Conclusiones y Recomendaciones, Mexico, 1981. Instituto Matías Romero de Estudios Diplomáticos, of the Secretariat of Foreign Affairs of Mexico and the Instituto de Investigaciones Jurídicas of the Universidad Nacional Autonóma de México, México 1981.

7. Estudios sobre el Régimen Jurídico de Asilados Refugiados y Personas Desplazadas.

   a) Argentina Ser/Ser.D/5.7 OEA/ACNUR/doc.7, 1984, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

   b) Bolivia Ser/Ser.D/5.13 OEA/ACNUR/doc.13, 1985, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

c) Brazil Ser/Ser.D/5.14 OEA/ACNUR/doc.14, 1985, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

d) Costa Rica Ser/Ser.D/5.4 OEA/ACNUR/doc.4, rev. 1, 1984, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

e) Ecuador Ser/Ser.D/5.17 OEA/ACNUR/doc.17, 1986, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

f) Jamaica Ser/Ser.D/5.16 OEA/ACNUR/doc.16, 1986, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

g) Honduras Ser/Ser.D/5.15 OEA/ACNUR/doc.15, 1985, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

h) Mexico Ser/Ser.D/5.5 OEA/ACNUR/doc.5, rev. 1, 1984, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

i) Nicaragua Ser/Ser.D/5.12 OEA/ACNUR/doc.12, 1985, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

j) Republica Dominicana Ser/Ser.D/5.8 OEA/ACNUR/doc.8, 1984, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

k) Venezuela Ser/Ser.D/5.9 OEA/ACNUR/doc.9, 1984, Secretariat for Legal Affairs. Organization of American States, Washington, D.C.

8. See document *supra* note 7(a), p. 8 and 7(d), p. 9.

9. See document *supra* note 7(b), p. 8; *supra* note 7(g), p.6; *supra* note 7(i), p. 6.

10. See document *supra* note 7(a), pp. 27 et seq.; *supra* note 7(d), pp. 22 et seq.; and *supra* note 7(i), pp. 25 et seq.

11. Informe sobre el Programa de Cooperación entre la Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR) y la Secretaría General de la OEA. Ser.G/CP/doc.1617/85. Organization of American States, Washington, D.C.

12. See Actividades del ACNUR. Informe correspondiente a 1985-1986 y proyecto de presupeuesto para programas par 1987, Parte V, doc. A/AG.96/667, pp. 8. et seq.

13. See document *supra* note 7(d), pp. 89 et seq.

14. See document *supra* note 7(d), pp. 84 et seq.

15. Sergio Aguayo Quezada y Laura O'Dogherty, "Los Refugiados Guatemaltecos en Campeche y Quintana Roo". *Foro Internacional* 27, no. 2 (1986): 266.

Causes of the Refugee Problem and the International Response

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The causes that lead people to choose a life of exile are multiple and increasingly complex. While they are relatively easy to determine in the case of individuals fleeing their homeland, it is much more difficult to analyze the combination of factors that act as a trigger mechanism for massive displacements of populations. In recent years, the question of root causes has assumed ever-increasing significance because of the rising number of large-scale movements of people within and across continents and because of consequent growing pressure on the existing international machinery to protect and assist them as well as the social and economic stress on the governments and societies of the receiving countries.

The problem is compounded by the fact that while countries in the First World have adequately developed administrative infrastructures for determining the eligibility of asylum-seekers for refugee status, those in the Third World, which bear the brunt of refugee influxes, have practically none. The latter are therefore obliged to have recourse to 'group eligibility' or the so-called 'prima facie eligibility'. The rigour of individual scrutiny of asylum-seekers

* The views expressed in this paper are those of the author and do not necessarily reflect the views of the Independent Commission or the United Nations.

in the developed countries stands in sharp contrast to the relative ease with which large numbers are treated as refugees in the developing countries. Even though 'group eligibility' has also been practised by countries in the North (Hungarians in 1956, Czechs in 1968), it is the movement of refugees from one continent to another that has been the cause for concern, particularly in recent years.

Furthermore, for the general public and even some policy makers, the distinction between asylum and refugee status is often blurred. The latter is defined in the 1951 Convention Relating to the Status of Refugees,[1] which does not refer at all to asylum except in the preamble which calls for burden-sharing and the need for international co-operation for the granting of asylum. Thus the notion of 'asylum' is yet to be the subject of a legally binding, universally recognized instrument. After the Declaration on Territorial Asylum, adopted by the UN General Assembly in 1967, the attempt, a decade later, to elaborate a convention relating to asylum proved abortive. The Conference of Plenipotentiaries, called by the UN High Commissioner for Refugees, adjourned *sine die* in 1977 after considering the first two articles of the draft submitted to it.

It is argued by some that what is important is to assist those in need and to alleviate the suffering of the uprooted. "When humanity surges across a border, it matters little whether the persons arriving are legally eligible to be considered refugees . . . the response is to care for them, provide them the necessities of life itself, and sort out identities, priorities and criteria later."[2] These are worthy humanitarian sentiments. Their analysis is, however, beyond the scope of the present paper.

It is nonetheless worthwhile in this connection to recall Recommendation E adopted by the Conference of Plenipotentiaries which elaborated in 1951 the Convention Relating to the Status of Refugees:

> The Conference
>
> EXPRESSES the hope that the Convention Relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.

More than one-third of the member states of the United Nations are not yet parties to the Convention, 36 years after its elaboration. These include several countries with major refugee problems. For

them, the discussion of the definition and of eligibility criteria is legally only of indirect relevance.

The term 'refugee' is used loosely, and increasingly by the media, to connote all kinds of people displaced by natural or man-made disasters. Similarly terms such as 'displaced persons', 'expellees', 'illegal entrants', 'asylum-seekers', and 'economic migrants' are used variously without a clear distinction between different groups. It is not necessary here to go into a semantic discussion. This paper uses the term 'refugee' in the traditional sense but demonstrates the need to broaden the interpretation of the legal definition in order to adjust it to the realities of contemporary global society.

Causes of the Refugee Problem

To assert that the *violation of fundamental human rights* is the principal cause of refugee problems is correct but an over-simplification of the phenomenon. Certain human rights are more directly relevant than others to refugee phenomena. Moreover, while these rights are universal, the emphasis may vary according to the region and the specific cultural and historical background of the societies producing or receiving refugees. In the developed countries, it is civil and political rights that are emphasized, while in the developing countries, greater importance is attached to social, economic and cultural rights. The Special Rapporteur to the UN Commission on Human Rights on the question of mass exodus[3] used the 1948 Universal Declaration[4] as the yardstick. The study showed that a change in the conditions that lead to mass exodus "requires a global approach towards such problems as human rights, economic and social disparities, peace and security, food and population".[5]

Attempts have been made to develop models encompassing the causes of the refugee problem. Suhrke, for example, developed a model linked to conflictual situations[6] and came up with seven types of refugee-producing conflicts: (i) independence struggles, (ii) ethnic conflicts with autonomy/separatist dimensions, (iii) internal ethnic conflict not related to autonomy/separatist struggles, (iv) class conflict, (v) inter-elite power struggles, (vi) state terrorism, and (vii) international wars, including internal struggles compounded by external intervention.

This model covers most of the refugee situations that have arisen since World War II. But it is obviously not comprehensive. It does not cover the non-conflictual situations involving crises, including what are called 'silent emergencies', which make life so intolerable as to oblige the victims to flee and seek refuge elsewhere. Above all, the model's bias for conflictual situations ignores the complexity of

contemporary circumstances where several concurrent phenomena contribute to the creation of a refugee situation.

More recently, Beyer[7] attempted a different approach, which shows sensitivity to auxiliary factors such as ecological and economic considerations. He divides refugees into six categories in order to cover all refugee-like situations: (i) Convention refugees, (ii) victims of civil strife, (iii) conscientious objectors, (iv) self-exiles, (v) victims of natural disasters, and (vi) migrants.

In this approach, causes are inherent in the categories. However, lumping together all the traditional refugee-producing factors under one category 'convention refugees' and then singling out some other specific groups amounts to categorization but not a model. On the other hand, Beyer rightly introduces, in this context, the term 'persons of potential humanitarian concern', thus broadening the framework of international action. To that extent, he goes in the direction taken by the Independent Commission on International Humanitarian Issues.[8]

The Independent Commission, however, went much farther in drawing attention to groups in situations analogous to those of refugees but for whom no adequate international instruments or mechanisms exist, such as victims of mass expulsions, internally displaced persons in countries that for all practical purpose are divided but whose internationally recognized borders hinder refugee status, and so on: 'persons whose plight is as real but who are by-passed by international arrangements and public debate'.

For the purposes of this paper, it is proposed to consider a model covering all the causes of existing refugees' situations, following the existing refugee definitions but juxtaposing them to new and analogous evolving situations. For convenience, we will call them *primary, secondary and auxiliary factors*. However, these terms indicate no hierarchy or order of importance.

- **Primary factors** are those enumerated in the 1951 Convention in Article 1.A (2), i.e., (i) racial, (ii) religious, (iii) political and (iv) social;
- **Secondary factors** are those partly enumerated in the 1969 Convention adopted by the Organization of African Unity and partly those accepted generally by the international community, i.e., (i) military, (ii) ideological and (iii) ethnic/cultural;
- **Auxiliary factors** are those that are completely outside the framework of traditional concepts of refugees but that in certain regions are playing or will play an increasingly important role as contributing factors to massive population movements. They are (i) economic, (ii) ecological and (iii) demographic.

The 10 factors just enumerated interact in different combinations. Hardly any contemporary refugee situation is the result of one single factor. It is therefore undesirable, as some tend to do, to single out a particular factor as the cause of a refugee situation. On the other hand, it would be useful to analyze a situation by isolating the contributing factors and to examine available methods of redress for each in order to contain the flow of refugees. Although it may not be possible to eliminate all factors and thus prevent the flow, it may be possible to diminish its severity. Likewise, if any of the auxiliary factors interact with one or several of the primary or secondary factors, it would be important to isolate the dominant factor in order to determine the nature of the exodus and decide whether and to what extent it is a genuine refugee flow.

The Ten-Factor Model

Some brief comments on the ten factors are in order.

In the case of the *primary factors*, the order of enumeration (racial, religious, political and social) is the same as retained by the Conference of Plenipotentiaries in Article 1 of the 1951 Convention. The primacy of race and religion is indicative of the special circumstances and the environment prevailing in the aftermath of World War II. However, both race and religion have relevance in the 1980s to a number of actual or potential refugee situations. The most obvious case of a racial factor is South Africa in terms of blacks at present and possibly whites in the foreseeable future. The resurgence of fundamentalism is bound to play the role of religious factor in many parts of the world.

The political factor hardly needs an explanation. It dominates the refugee scene in the sense that an element of it is present in practically all refugee situations. This is so because politics reflects the ills of a society as much as its strong points and because in the end, most situations end up getting politicized, if they are not political at the outset.

Furthermore, there is usually a conspiracy of silence surrounding political issues, which in themselves are often the primary cause leading to refugee flows. That political questioning should be seen, generally, as going against the humanitarian grain—and even endangering refugees—is a mark of the failure of national policies in today's body politic. This failure sometimes manifests itself through a catalogue of horrors that surround many refugee situations: abduction, murder, rape, pirate attacks or abandonment when in distress on the high seas, armed aggression against camps, arbitrary detention and torture, or threats to security by para-military groups.

The social factor originally did not have, for the drafters of the 1951 Convention, a special significance. In fact, as stated by Grahl-Madsen, "membership of a particular social group was added by the Conference of Plenipotentiaries as an afterthought".[9] However, the notion of social group is "of broader application than the combined notions of racial, ethnic and religious groups and in order to avoid a possible gap, the Conference felt that it would be as well to mention this reason for persecution explicitly".[10] The application of this factor in contemporary circumstances is, however, clear. Social factors are inextricably linked in most countries to political factors. Moreover, the notions of class and caste are relevant to this factor in many societies.

In its Article 1, the 1951 Convention also mentions 'nationality' as a factor. We have not included it because of its specific and limited connotation at the time. However, if interpreted broadly, it could be applicable today as a factor if one were to accept the usage of the term 'nationality' as employed in certain countries to denote specific minorities or ethnic groups.

The *secondary factors* have, during the last three decades, assumed much greater importance than the primary factors. As for the military factor (the term 'military', although not very satisfactory, is used here in the absence of a better one), it should be interpreted to include armed violence and conflicts, both between States and within States. Wars are no longer declared, and most are fought by proxy where external forces use belligerents in a context of realpolitik. It also includes internal strife, communal riots and guerilla warfare, as well as state terrorism practised by repressive regimes. A majority of today's refugees are victims of the military factor, which although not enough in itself to satisfy eligibility criteria, plays an important complementary role in refugee flows. Serving often as the trigger for massive exodus, it is combined with one or several primary factors. The 1969 OAU Convention, in Article 2, specifically adds this factor to the eligibility criteria by stating: "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence . . .".

The ideological factor became active even before the ink had dried on the 1951 Convention. It has continued to play a significant role since, not only in terms of East-West rivalries and tensions but also, by extension, in a number of South-South situations. The nature of a majority of present-day regimes – mostly authoritarian and repressive – ensures that the struggle between the oppressed and the oppressor will continue to be important in terms of possible refugee flows. It should be noted also that the scope of the ideological factor is

not limited to tensions between communist and capitalist systems. As for the ethnic factor, we have considered it useful to give it a place of its own in addition to the racial and social components of the primary factors. This is because of the specific nature of the ethnic dimension which, linked more directly to language and culture, is an increasingly important contributing factor in the context of ethnic rivalries and cultural clashes. Indigenous peoples around the world offer a good example of the potential of this factor in terms of refugee flows, particularly in certain developing countries.

Auxiliary factors have, in recent years, begun to dominate the refugee scene, sometimes to the detriment of genuine refugees. Economic migrants who, often for reasons of personal convenience, arrive in developed countries, or who claim fear of persecution in order to avoid returning home have become a familiar feature of the refugees' lobbies in the West. On the other hand, economic conditions and social pressures in the developed countries are increasingly obliging these countries to have stricter border controls and immigration policies. The phenomenon is also having a negative impact on refugee policies. In the developing countries where 'group eligibility' is practised, the distinction between refugees and economic migrants is becoming difficult to maintain. The same applies also to the so-called 'ecological refugees' – victims of drought, crop failures, famines, etc. In many parts of Africa in the last few years, the number of victims of ecological breakdown has increased dramatically. Many of those who cross international borders simply because of geographical proximity or tribal affiliations end up in refugee camps. Humanitarian considerations have, understandably, prevailed upon legal criteria to allow them access to international aid. It is clear, however, that economic migrants and ecological refugees present a challenge to existing international mechanisms that has hitherto remained largely unmet.

In the 1990s, the demographic factor is bound to play an important role in relation to massive population movements. Rapid and largely uncontrolled population growth, the growing number of young people (those below 25 will constitute the majority of world's population before the end of the century), persistent poverty and unemployment are elements that will collectively contribute to large numbers of people leaving their homes in search of a better life and livelihood. The massive challenge that already exists in certain parts of Africa and Asia will grow relentlessly and will call for adequate responses at a global level.

In conclusion, it may be said that the 10 factors or causes leading to refugee flows are likely to continue to exercise their influence, in different combinations, on these flows. In the coming years, pressures are bound to increase, even though the global number of genuine

refugees may not increase substantially. The impact of continued refugee flows on the already fragile socio-economic structures of the developing countries may well be dramatic and tragic. As for developed countries, large-scale arrivals of asylum-seekers, especially at destinations far from where they claim to have suffered persecution, are already provoking a growing restrictiveness in asylum policies and a narrow interpretation of refugee status. Even if the peremptory norm of *non-refoulement* ensures admission, for many states the political and legal reality is such that they will not undertake any further obligation to grant asylum in a liberal manner. This is reflected in the terminology of the new forms of safe haven now granted by many industrialized states, such as "exceptional leave to stay" in the United Kingdom, or "extended voluntary departure" in the United States.[11]

The Dilemma of Definition

In the final analysis, the action that needs to be taken and the obstacles that may be encountered depend largely upon a clear perception of *who* one is talking about. In pragmatic humanitarian terms, the question could well be *how* one should help those in need rather than whom to include or exclude. In legal (and political) terms, however, the question of definition becomes a central one. In his analysis of global refugee policy, Keely concluded that "the emphasis of governments and organizations on determining who qualifies as a refugee is a continuation of an outlook and an international machinery based on the European situation of 30 to 35 years ago".[12]

It is interesting to note in this connection that the legal definition of a refugee provided by the 1951 Convention is based on "well-founded fear of persecution". The key notion of 'fear' does not lend itself easily to precise legal meaning. It is a state of mind whose validity depends largely on the judgement and inclinations of those evaluating it. Moreover, as jurisprudence relating to eligibility determination amply demonstrates, the applicant has to demonstrate both subjective and objective elements to prove the case of persecution.

The definition is useful for extending or withholding the benefits of the Convention to individuals or small groups in industrialized countries. But in the developing countries, with refugee flows running into hundreds of thousands of persons, the question of applying the 1951 definition individually (which is the only universally accepted definition of a refugee) becomes somewhat academic.

In terms of *obstacles* to effective international responses to the problem of refugees, the most important is the lack of an even-handed

humanitarian policy to be applied universally. Allowing purely humanitarian considerations to prevail upon political considerations is a challenge that governments have found difficult to face. Secondly, the approach to refugee problems should be holistic, not directed only at assisting those in need but also at causes and containment, if not prevention.

International organizations can play a constructive role in serving as a bridge between the countries of origin and of asylum. This calls for leadership and vision on the one hand and the political support of governments on the other. A humanitarian policy that takes full account of political considerations and constraints but remains nonetheless humanitarian is not easy to formulate or put into practice.

Annex I to this paper shows the international machinery developed to address the refugee problem since 1921. Unfortunately, despite all the experience gathered in responding to natural or man-made disasters, and despite calls to set up early-warning systems, international bodies, as a whole, have not been able to overcome their own structural contradictions: the various organs of the United Nations are hamstrung by political constraints and by hierarchies committed to an inter-governmental status quo, while the non-governmental bodies have been too directly involved in assistance and too compartmentalized to bring concerted pressure to bear on those who have responsibility and power to address root causes.

As for the concrete steps that can be taken by governments and organizations, these have recently been analyzed by the Independent Commission. Being closely associated with that process, it is appropriate to conclude this paper with the relevant extract from the advance copy of the final report of the Commission, in the hope that it will facilitate discussion.

> *In conclusion*, we wish to emphasize the need for elaborating international humanitarian standards and strengthening the assistance network at the national and international level for those groups of uprooted persons who do not clearly fall within the category of refugees as defined by existing international instruments. We recognize that this relatively unexplored field does not lend itself easily to definitive recommendations and suggestions without a more thorough study. We urge governments, inter-governmental agencies and non-governmental organizations, as well as scholars and experts to undertake such studies and to look into practical ways and means to alleviate suffering and promote solutions to the problems. There are now tens

of millions of displaced and uprooted persons and their numbers may well increase if timely action is not taken.

Insofar as refugees as defined by existing instruments are concerned,

We are of the opinion that: In the field of protection, it is essential to elaborate further the concept and State practice relating to asylum. The international community must support this process giving positive expression to the notions of burden-sharing and human solidarity. States should be dissuaded from introducing measures designed to deter individuals from seeking asylum. Likewise, it is essential that governments deal with asylum applications quickly, thoroughly and in a context where humanitarianism prevails over political considerations. The inter- and non-governmental agencies concerned have a vital role to play in assisting governments in this regard and in exerting pressure when humanitarian principles are not fully respected.

- A set of minimum humanitarian standards applicable to refugees and asylum-seekers should be developed and the international agencies should monitor and encourage their observance by governments and local communities;
- The physical security of refugees in situations of conflict must be strengthened by governments and the international agencies should play an active supervisory role;
- International humanitarian agencies must enjoy free access to refugees and in situations of tension or conflict the possibility of stationing impartial "humanitarian observers" should be explored.

Regarding material assistance, we are of the opinion that:

- Available sources must be equitably distributed among the countries receiving large numbers of refugees and objective humanitarian rather than political criteria should be applied by donors;
- Accurate censuses of refugee populations are required and their needs should be more precisely assessed;

- Emergency relief assistance should be provided for a pre-determined and limited period and income-generating projects as well as assistance measures designed to promote self-sufficiency should be encouraged;
- The concept of refugee camps and rural settlement needs to be radically reviewed. Beyond the emergency period when they are required, camps have serious disadvantages. They rarely become self-sufficient. They also produce social tensions and constitute "human islands" which isolate refugees from their local hosts while creating open-ended dependency upon external assistance;
- Criteria of material aid to refugees should be standardized in terms of nutrition, health care and other subsistence items. Donors should provide aid which corresponds to real, identified needs and also to the habits and traditions of the recipients.

In terms of durable solutions, we firmly believe that:

- Voluntary repatriation, as the most suitable solution, calls for a more vigorous approach on the part of international organizations and governments. While respecting scrupulously the voluntary character of repatriation, efforts should be made to create a climate more conducive to return. It is important in this connection to strengthen aid programs for returnees. Such programs should be of longer duration than a few months and should be so designed as to promote self-sufficiency;
- In the case of local settlement, the concept of "spontaneous integration" or self-settlement needs greater attention and encouragement than has hitherto been accorded it. It is the preferred option of a majority of refugees and calls for better understanding of local conditions by the aid agencies. They should call on experts possessing knowledge of the customs, habits, traditions and historical background of refugees and local communities, in order to develop appropriate assistance projects to encourage and facilitate self-settlement;
- Finally, with regard to the resettlement of refugees in a third country, the possibilities of resettlement within the region or the continent should be

vigorously pursued. Where necessary, donors should provide extra assistance to the countries and the local communities to facilitate self-sufficiency of refugees. Intercontinental migration should be pursued only when all possibilities of resettlement within the regions have been fully explored and exhausted. (The Independent Commission on International Humanitarian Issues, *Report*, 1987)

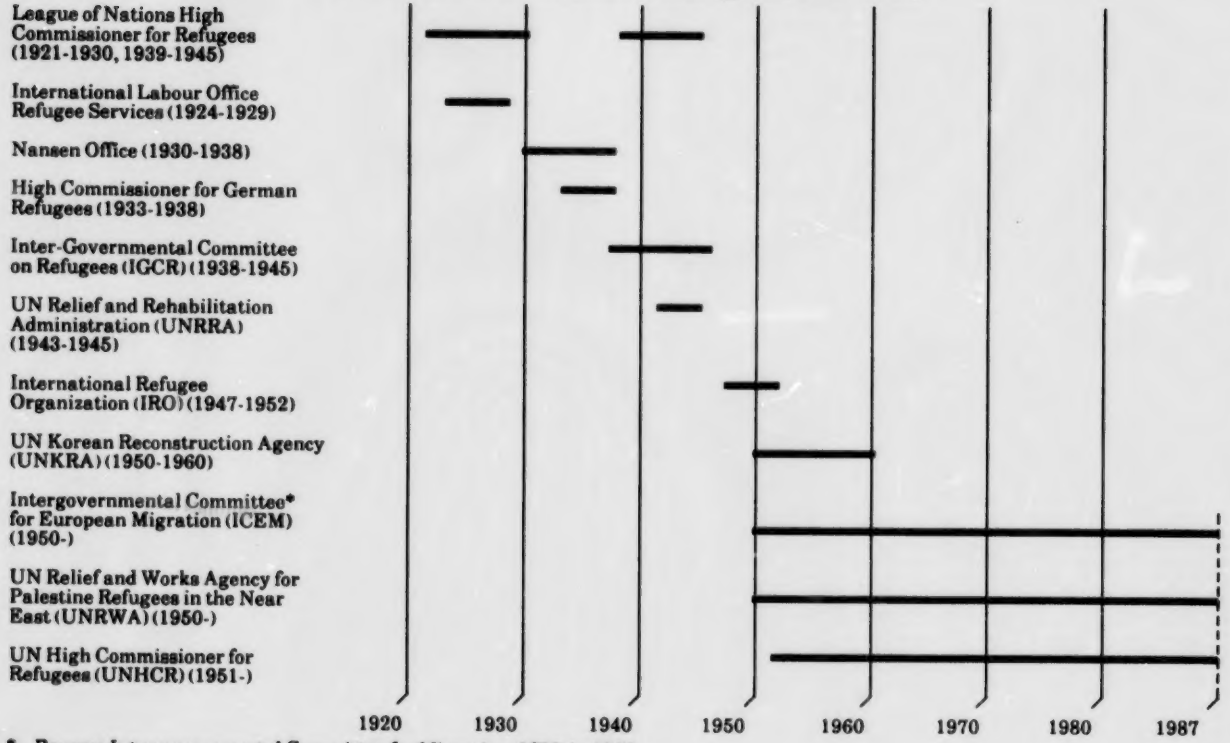
Notes

1. United Nations Treaty Series, Volume 189, p. 137 et seq.
2. Jonathan Moore, "Refugees and Foreign Policy: Immediate Needs and Durable Solutions", Speech, Harvard University, 6 April 1987.
3. Sadruddin Aga Khan, *Study on Human Rights and Mass Exoduses*, United Nations Doc. E/CN.4/1503 of 31 December 1981.
4. United Nations Doc. A/811, Declaration of 10 December 1948.
5. Sadruddin Aga Khan, *op. cit.*, paragraph 34.
6. Astri Suhrke, "Global Refugee Movements and Strategies: An Overview", Wingspread Workshop Paper, August 1981, pp. 17-23.
7. Greg Beyer, "Improving International Response to Humanitarian Situations", Refugee Policy Group, Washington, September 1987.
8. Independent Commission on International Humanitarian Issues, "Refugees, The Dynamics of Displacement" (London/New Jersey: Zed Books, 1986).
9. Atle Grahl-Madsen, *The Status of Refugees in International Law*, Volume I (Sijthoff, 1966), p. 219.
10. *Ibid.*, p. 219 (cf. UN Doc. A/Conf.2/SR.19, 14).

11. Guy Goodwin-Gill, *The Refugee in International Law* (Oxford, 1983), p. 119.

12. Charles Keely, *Global Refugee Policy* (New York: The Population Council, 1981), p. 24.

Annex I
Institutional Mechanisms for Refugees (1921 - 1987)



* Became Intergovernmental Committee for Migration (ICM) in 1980.

Comment on the Papers by Caminos and Rizvi

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I will discuss the papers briefly.

Mr. Caminos ends his paper by stating that international concerns can be played out only on national territories and, unless they become national concerns, all our efforts for international solutions are likely to stumble. What we face in this hemisphere, as Mr. Caminos pointed out, is a lack of consistency. To take one example, both the United States and Canada have refugee determination processes. They are, for all their similarities, applied differently – very largely for political reasons, not necessarily for objective or other determinable reasons. Thus, a Salvadoran claiming refugee status is likely to be rejected 97 per cent of the time in the United States but is likely to be accepted in Canada.

Old concepts of the definition of what constitutes a refugee stem from a time of largely political movements and are no longer adequate. Yet, we still cling to the conventions of the past and have not graduated to the needs of our time. All refugee determination takes place on an individual basis. However, many refugee movements are not individual but group movements. I was once, 52

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years ago, a refugee coming to these shores. Had I come under existing refugee legislation, I would have been turned back (or at least not accepted), because while nothing had happened to me personally, I was a Jew and Jews as a group were persecuted. However, this kind of concept is not applicable in most national legislations. Something needs to be discovered or, I should say, rediscovered.

The term 'asylum' (found in the Bible, as well as in Greek and Roman law) was once a quality adhering to the person who was persecuted or who sought asylum. In other words, the right to asylum adhered to the person who was fleeing. Today, the right of asylum is determined, not by the needs of the person, but by the legislation of various states. This shift took place some time ago, for it is well to remember that only a little over 100 years ago, there were hardly any laws anywhere in the world that restricted access to territories anywhere. Restriction of access, which we now call border control and immigration and refugee legislation, did not exist 120 years ago. Canada and the United States advertised in the European press for people to come to North America – there was no question of closing the borders: they were wide open and this was the case in most other countries.

Mr. Caminos emphasized that the term 'refugee' in international convention has an objective as well as a subjective definition. The broad definition is objective, but the term also has a subjective component, for it contains the words "a well-founded fear of persecution". 'Well-founded' and 'persecution' are objective elements, but 'fear' is a subjective element. One may construe the international definition as providing an objective framework and, within it, an individual subjective component. The proposed Canadian legislation very subtly drops the definition with the objective component and now speaks of a "credible" basis. "Credible", besides its very purposely vague definition, is in the eyes of the beholder and no longer may be construed as an objective definition with a subjective component.

The figures that Mr. Caminos presents are fascinating. One would think Costa Rica was larger than Canada or the United States from the number of refugees they are able to absorb. Moreover, Costa Rica has developed national programs for refugees that are of the highest humanitarian order. Yet, Costa Rica, of course, is a tiny country. It has only 10 per cent of the population of Canada. Yet we here in Canada have recently developed certain xenophobic concerns that make it possible for us to convince a gullible public that we are overrun by 150 Tamils and 175 Sikhs, that they are swamping this country and that, consequently, what we need is the most stringent legislation. In the 1930s, Canada could take only 4,000 refugees from the Nazis, but the Dominican Republic took 5,000 refugees.

Mr. Caminos suggests that new inter-American efforts should be made that might establish at least a new world consensus. For that, the political climate has to be right, and I am afraid that in Canada at the moment it is not. It is our responsibility to change public opinion back to the state of mind that existed a few years ago when we took close to 100,000 Vietnamese into this country. We took them cheerfully, they are part of this country, they have added to the wealth of this country, both culturally and economically, and I hope that this time will come again.

Now, very briefly, a few words on Mr. Rizvi's paper. It is interesting to note that the poorest nations in the world (and sometimes the smallest nations as well) do the most to accommodate refugees. Consider the example of Sudan, a very poor country, which has hundreds of thousands of refugees within its borders. Rizvi points out that all governments, even the most restrictive ones, will profess their adherence to humanitarian ideals. When I was preparing my report, I travelled abroad and found that even those governments that were in the process of clamping down on refugee admission professed in most glowing and prophetic terms how they were concerned about refugees. There is a big gap between profession and action, and it is ironic that the poorest continent of all, namely Africa, has the most progressive refugee definition.

Let me make two final points. What should concern us here in Canada (and in other countries as well) is the increasing obfuscation between immigration and refugee protection. The very fact that under Bill C-55, Employment and Immigration officers are to be involved in refugee determination decisions illustrates this. Immigration is a *privilege* that a country accords to non-citizens. Refugee determination is accorded by partners to the international convention because it is part of our law; therefore, when a person is a refugee, he or she is *entitled* to be recognized as a refugee. The right of immigration may be granted as we choose; however, the refugee of right can demand recognition of his or her status. I close by saying that, while there is a backlash in this country and while there are still many people who believe that immigrants and refugees take jobs away from people rather than enrich a country, it is the task of those concerned with these issues to bring forth the *best* in our people.

Causes of Refugee Problems and the International Response

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This paper briefly considers the causes of refugee movements before analyzing the international response and suggesting necessary improvements and developments.

There are, at present, several ways to describe refugee causes; they include three models which, if integrated, summarize the causes of refugee-producing problems. Suhrke's model of conflict situations pinpoints the following types of conflicts that may produce refugees. She notes that protracted warfare, international wars and certain kinds of ethnic tension tend to produce major outflows, whereas conflicts such as elite rivalry, coups d'état, and governmental suppression of critics lead to a trickle of a few, highly politicized individuals (Suhrke 1983). Beyer proposes the following categories of people of potential humanitarian concern: Convention refugees, victims of civil strife, conscientious objectors, self-exiles, victims of natural disasters, migrants and perhaps persons belonging to governments in exile or liberation movements (Beyer 1987, 12-15).

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Finally, Rizvi's model, elaborated elsewhere in this volume, of primary factors (as enumerated in the 1951 Convention), secondary factors (as identified in the 1969 OAU Convention) and auxiliary factors (such as economic, ecological and demographic change) needs consideration.

These causes have elicited a variety of responses from the international community to approaching the present refugee problem. In this regard, several United Nations initiatives are particularly noteworthy. The Economic and Social Council of the United Nations recommended to the General Assembly for the first time in 1967 the creation of an office of the United Nations High Commissioner for Human Rights, an initiative that remained unsuccessful despite several years of debate (United Nations 1967). In 1981, the U.N. Commission on Human Rights appointed the former United Nations High Commissioner for Refugees, Saddrudin Aga Khan, as Special Rapporteur to prepare a study on Human Rights and Mass Exoduses that was submitted the same year. This study has become a widely used reference on the subject. Among several important recommendations, the following are most relevant here:

(i) "humanitarian observers" to secure a United Nations presence in any given violent situation;

(ii) an "early warning system" to gather impartial information on underlying problems (such as ethnic, economic, political and social issues) in any given region for the United Nations Secretary-General, who would then act in an effort to contain the situation; and

(iii) a special representative for humanitarian questions to monitor situations that could give rise to new refugee situations and to depoliticize humanitarian crises through mediation (Saddrudin Aga Khan 1981, i-ii).

This report was followed in 1981 by the General Assembly resolution (United Nations 1981), initiated by West Germany, to appoint a group of governmental experts on international co-operation to avert new flows of refugees (Opitz 1985). This initiative resulted in a final report on 13 May 1986 by the Group of Governmental Experts (United Nations 1986a, 18). This report did not make any specific recommendations but reminded member States of their obligations to respect international principles, such as those contained in the United Nations Charter and other instruments, as well as to refrain from pursuing policies that would lead to new flows of refugees. The Group also recommended that the Secretary-General make full use of his competencies, give attention to questions of averting refugee problems, and improve co-ordination within the Secretariat for

analyzing information for early assessments of situations that could cause refugee flows.

In addition, the group of 18 high-level intergovernmental experts, following a review of the Secretariat's operations, made another set of recommendations (UN 1986, 9; Supplement, 13b). The two groups of recommendations led the Secretary-General to establish the Office for the Research and the Collection of Information (ORCI). Its functions are to strengthen the institutional basis of preventive diplomacy and to break down barriers to peace-making with information and analyses (UN 1987). Three of these functions relate directly to refugee causes (Jonah 1988, 7):

(i) monitoring factors related to possible refugee flows and comparable emergencies;

(ii) providing early warning of developing situations requiring the Secretary-General's attention; and

(iii) carrying out ad hoc research for the immediate need of the Secretary-General.

Private initiatives include the Refugee Policy Group in Washington, which has been working with associated individuals and institutions on the subject since the early 1980s. With financial support from various sources, important groundwork for its current work on an early warning model has been done.

However, it is clear that more needs to be done and a number of possible initiatives can be identified. First, in terms of research, it would be important to establish a systematic study of the causes of refugee flows, distinguishing between root and proximate causes, and to consider both remedial and preventive action. Indeed, it would also be useful to prepare a map of vulnerable areas in the world where refugee situations might arise. Certainly, it would be useful to obtain detailed information from the first refugees in a potentially massive refugee influx concerning their reasons for flight, conditions in their home country, and the estimated number of people liable to move if nothing is done to alleviate or contain the underlying causes.

Second, in terms of intervention, United Nations or other international observers could be sent on short-term field assignments in an effort to depoliticize and pacify incipient situations that might cause refugees, such as in Bangladesh shortly after independence in 1971-72. This might involve "political management" through direct contact with concerned governments or via the encouragement of good neighbourly relations to alleviate or contain the severity of the refugee crises. Certainly, past international action in easing the plight of displaced people or refugees has been successful in some cases. In the Nigerian War, for example, the creation of zones of safety within the country resulted in practically no external

displacement taking place. Similarly, after the coup d'état in Chile, the establishment of safe havens under United Nations auspices permitted refugees from other countries and, a short time later, nationals fearing persecution to find a safe place to stay before leaving the country with safe-conducts provided by the military junta that had seized power.

Other creative approaches would include, as Coles has suggested elsewhere in this volume, the restoration of freedom of movement of people to their country of origin (in conjunction with a co-ordinated effort to help improve conditions in the country of origin for their return if they so wish). An important additional step is similar to the recommendation of the Independent Commission for International Humanitarian Issues in its final report. This would be to create a central office for humanitarian issues within the Executive Office of the Secretary-General of the United Nations. On the basis of the information collected by ORCI, this office could conceptualize a course of action in a given incipient situation to alleviate the underlying cause or reduce the severity if flight is the only alternative. Such an office could become the link between institutions that assist victims of humanitarian crises and governments that have the power to address the causes of these crises. The office would not only translate first-hand information into practical action but also monitor the implementation of United Nations humanitarian programs and take a lead in formulating and co-ordinating policies to alleviate or contain incipient refugee situations. This approach might allow for a more efficient co-ordination of tasks within the United Nations family and not force the UNHCR always to respond to every border crossing, especially if one or a combination of ecological/drought/famine, demographic or economic factors had caused it.

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Towards Self-Reliance: One Element of an International Response for the Protection of Refugees

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> . . . the immediate response of the international community to a major influx of refugees must take account of the ultimate aim of promoting a durable solution to the problem. This requires that the response both encourages the self-sufficiency of the refugees and avoids prolonged dependency on outside relief.
>
> *UNHCR Handbook of Emergencies*

The world refugee population, exceeding 10 million persons, has presented the international community with a tremendous challenge to find solutions to their plight. International responses so far have been based on the conventional approaches of relief assistance and resettlement in third countries, but these have proved to be inadequate.

The International Labour Organization (ILO) has been involved in research and in projects that seek to promote self-reliance and economic integration as alternative solutions to the conventional approaches. This paper reports on three examples to demonstrate the value of such an approach and indicates their general significance in terms of future responses to the plight of refugees.

At the request of the Government of Sudan, a joint ILO/UNHCR Mission on Employment, Income Generation and Training of Refugees

visited Sudan in order to propose a viable plan of action in November-December 1981. The findings of the mission represented a response to a growing consciousness that the problem of refugees is no longer a transient one and, therefore, that immediate and long-term solutions are called for that enable refugees to attain a self-reliant existence. The mission findings emphasized the need for solutions that answer the problems of refugees and the Sudanese. As a result, the ILO/UNHCR Project on Income Generating Activities was launched.

A striking observation emerging from the field work and the analysis is the necessity and the tremendous potential of an approach based on self-reliance for improving the standard of living of refugees. Two prerequisites for the success of this approach are imperative: firstly, the will to mitigate the obstacles, institutional or otherwise, in the way of creating income-generating activities for refugees and, secondly, the will to accept the popular participation by the refugees in decisions that will eventually affect their lives. Naturally this approach is no substitute for the return of refugees to their place of origin, the treasured hope of the majority of them. But it modestly aims at making the life of refugees in the host country productive and dignified and at increasing their skills acquisition so that they add to the human capital of their country on return.

Conditions in the Sudanese economy and opportunities in its labour markets provided the starting point for the next step, which was to propose a number of viable projects using existing skills among the refugee population and aiming at achieving self-reliance for refugees over the medium run.

The resulting ILO projects were conceived to fulfil needs for three different categories: agricultural projects, non-agricultural projects and projects designed specifically for a particular target group, female-headed households. An important feature of the project proposals was that they should be taken as a package and not as a number of scattered activities.

It would be an exaggeration to claim that self-reliance for refugees would be achieved overnight if these projects were carried out. The objective was less ambitious: to provide a package of income-generating projects on a pilot basis, representing the beginnings of an approach towards the self-reliance of refugees.

Another aspect can be seen in the ILO's work with refugees in Somalia from 1981 to the end of 1984. The ILO has tried to set its activities within the specific conditions peculiar to refugee camps in Somalia – camps that are both crowded and isolated from the national infrastructure; that for years have housed thousands of people, all totally dependent on external aid; and that have little potential for development into permanent settlements. Indeed, until 1983 the Government insisted that the only durable solution was voluntary

repatriation to the refugees' country of origin. In March 1983, the Government accepted that the refugees' presence in Somalia might continue for the foreseeable future and therefore accepted the need to create settlements for the refugees, not just camps.

The main objective of the ILO project, from its earliest work in an emergency situation to its later development in a more stable environment, was to assist refugees (most particularly women heads of households) to earn an income. The attempt to develop such income-earning activities was naturally influenced by the extraordinary circumstances within which the refugees were placed.

Through the "Income-generating project for women refugees in Somalia" the ILO's activities in 1981-82 sought to reach several hundred women in a total of nine camps in two regions of the country – Hiran in the south and the north-west region. Out of this "emergency phase" grew a more long-term oriented development project from 1983 to December 1984, which concentrated its work in a complex of four camps clustered around the tiny town of Jalalaqsi, in the Hiran region.

Among the products commonly made by refugee women were sleeping mats, woven from palm leaves. This skill was almost universal and palm leaves were readily available in most regions where the camps were situated. In its Somalia Programme for 1980-81, UNHCR listed several items for which it requested funds nationally, including sleeping mats. It therefore seemed reasonable to propose that refugee women should be assisted to produce sleeping mats that could be bought by UNHCR to substitute or supplement those being imported.

This income-generating project for women refugees in Somalia began on 1 April 1981. The objectives in this first phase of implementation were immediate, reflecting the emergency situation in which work would be developed. Individual participation and production fluctuated, probably according to a household's need for cash. While the number of participants remained fairly constant, a total of more than 600 women made mats for sale. Women took turns joining, taking the opportunity to earn a little extra cash when they needed it most and making way for a relative or friend after a few months. Average earnings were estimated at 80 shillings per month (almost $12). A minority of women earned double that amount. A small survey, conducted in June 1982, established that most women used this income to buy fresh vegetables, milk and meat, or items such as shoes, soap or firewood (which, even then, was becoming scarce in the vicinity of the camps and time-consuming to collect). Only one woman (who lived alone) used her income from mat making to invest in another gainful activity, buying a donkey cart-load of fuel wood which she then resold in small bundles.

The mat-making project was not a "self-sufficient" activity. But in the context of an emergency, with the need to introduce a cash-earning scheme swiftly for as many people as possible, this project can be seen as having broadly achieved its stated objectives. As the first income-generating activity to be established in the difficult conditions of refugee camps, it demonstrated to the refugees the possibility of earning cash through productive activities. It was important that several hundred women were given the opportunity to earn a small amount of cash and to practise an existing skill at a time when paid employment was reserved almost exclusively for men.

It is useful to consider how far such income-generating projects can provide an alternative to the refugees' total dependence on aid and how income-generating projects that lead to self-reliance can be developed in the artificial conditions of isolated and crowded refugee camps.

Farming in most camps has limited potential because the necessary irrigation requires large capital inputs. The alternative is non-farming activity; again, however the potential is not great because camp populations can support only a limited number of artisans, and refugees have difficulty competing with established non-refugee artisans in wider markets. Moreover, since the overwhelming majority of refugees are pastoralists or farmers, different approaches are needed. Consultants have suggested a variety of activities that might be developed to fill this need, but the lack of raw materials makes industries such as glass bead manufacture or hand-made paper production infeasible.

Assistance to refugees to develop income-generating projects through small-scale industries should be seen in national terms, rather than in the confines of a refugee camp. It is clear that an approach relying largely on the refugees' existing skills and on the development of only those activities that are marginally sustainable within a camp cannot lead ultimately to the self-reliance of even a significant portion of the refugee population. Such an approach can only provide small groups with an income to supplement their food rations and can seldom provide an alternative subsistence base. It seems logical, therefore, to argue for the need to plan a measure of integration of the refugees in the national economy, so that they can become both beneficiaries from and contributors to national development plans; and to suggest that assistance to refugees should follow the lines of assistance to Somalia's overall development, particularly with regard to import substitution.

Turning to Latin America, the increasing distance of labour migration and refugee movements since 1970, along with growing employment problems in the region, have caused refugees and migrants to be met with the same problems on arrival in the host

country. As a result, the ILO and the UNHCR agreed to set up a regional project to obtain information on the socio-economic characteristics of foreigners (migrants and refugees) in a number of Latin American countries and to diagnose the economic and social situation of their labour markets and the legal conditions governing the integration of migrants.

The diagnoses carried out in the seven participating countries (Argentina, Bolivia, Costa Rica, the Dominican Republic, Honduras, Nicaragua and Venezuela) made it possible to determine a number of elements on which feasible strategies for project identification could be based.

The analysis showed that the labour market situation, international migration trends and the migration policies of the countries involved are essential parameters in the formulation of any valid strategy for the social and occupational integration of refugees in each country.

It is also possible to draw two broad conclusions as to the future labour insertion of refugees in Latin America. First, as regards the Central American countries in question (Costa Rica, Honduras and Nicaragua), the rapid increase in the number of refugees over the past few years and continuing armed conflict in the area could lead to an increase in the flow of displaced persons and refugees to the countries currently receiving them.

If we consider this fact in the context of the generalized economic crisis, worsening unemployment and the concomitant increase in international migration, we are drawn to envisage a situation where Central America is likely to be increasingly unable to absorb massive contingents of refugees.

Second, in Argentina, Bolivia and Venezuela, marked imbalances between rural and urban populations and the resulting underpopulation of vast regions are preventing their natural resources from being developed and their territories from being inhabited. This makes these countries suitable areas for the absorption of large contingents of people, provided that the latter can be integrated into development programs.

Strategies for the movement of Central American refugees should take into account the whole Latin American region. They should not be confined to the Central American countries, where the ratio of foreigners to nationals has become critical in some cases, but should also include the South American countries as potential receivers of Central Americans.

Furthermore, since the main objective of organizations such as the UNHCR is to protect refugees, while one of the basic principles of the ILO is to protect the migrant worker, it was recommended that approaches to refugee work be sought in which the objective of

"protection" is compatible with that of "development". This recommendation is based on the fact that the tradition of political asylum is an institution in Latin America; this, along with the international agreements subscribed to by the different countries, might well encourage governments of the region to find humanitarian solutions to the refugee problem.

What conclusions can be drawn from these three analyses? The plight of large-scale refugee populations in the Third World is brought repeatedly to world attention. The massive emergency assistance mounted on such occasions slowly turns into a prolonged temporary situation of refugees who themselves become captives of their dependence on outside supplies. Host governments and specialized agencies, including various voluntary bodies, are increasingly concerned about the burdens placed on local societies by the presence of large numbers of refugees and the constraints put on fragile economies by the logistics of assistance. The coexistence of refugees with local populations; who live under conditions of poverty quite similar to those of the refugees in their countries of origin but are excluded by and large from the benefit of refugee assistance, introduces additional strains. The ILO analyses demonstrate that alternative solutions and modes of assistance based on labour integration and income-generating projects are needed. These solutions must be more compatible with the host countries' development efforts and capacity and the refugees' own dignity. The ILO will continue to play its part in protecting this dignity, as well as the refugees themselves.

Discussion

Two themes were highlighted in discussion following this session: the order of priorities for solutions suggested in Zia Rizvi's paper and the way in which a country, by its handling of refugee problems, might retain credibility on the international stage. Indeed, both themes were closely interlinked in many discussants' analyses of the issues.

Rizvi had placed the three durable solutions to the problem of refugee settlement in the following order of priority: first, voluntary repatriation; second, local resettlement; and third, resettlement in another country. However, a number of commentators disagreed with this ordering. Some disputed the suggestion that voluntary repatriation was the most suitable solution, arguing that it did not reflect the reality for many refugees. Others believed that Western governments are content to support such a ranking of priorities only because it advances their hidden agenda, "the policy of non-resettlement", which seeks to keep resettlement in the West as the least preferred solution. One outcome is that if governments insist on a first priority that is unobtainable in reality, refugees are in danger of being consigned to a limbo of inaction. In response to these points, it was suggested that voluntary repatriation had to be seen as the most desirable solution on personal and humanitarian grounds. Most refugees wish to return to their own homes, and for this reason it is

the most preferred solution, although practicalities may dictate otherwise.

Other speakers did not wish to see resettlement in other countries as a third priority on the list, arguing that the way a country reacted to spontaneous arrivals and to resettling refugees from abroad should be seen as the most important factor, philosophically and in terms of the attitude of the country toward the plight of refugees. In reply to this observation, it was noted that, from a global perspective, the priorities for remedies as ordered by Rizvi are correct. Indeed, in supporting this argument some speakers noted the need for a global strategy for solving refugee problems to counter the increasingly defensive action of many states; some pointed out that often only small political changes had to occur in their own country before many refugees would return to their homes, and others argued that repatriation was prevented in certain cases only by countries of asylum that wished to use the refugees' plight in their ideological battle with the refugees' country of origin. In fact, discussants generally agreed that from other perspectives, it is possible to see different rankings of priorities but this does not negate the veracity of the original viewpoint.

Thus, when turning from a global to a national perspective, several speakers observed that countries will be judged not by their grand ideals but by the little things they do. As John Kennedy once said, history will judge us not by what we preach abroad but by what we practice at home. In other words, a country's behaviour with respect to admitting refugees from overseas is of the utmost importance, not because of its impact on the global total population of refugees (which is small) but because it demonstrates that country's degree of humanitarianism and bears witness to the strength of its commitment to help refugees. Indeed, it was argued that a country could demonstrate its credibility on the international stage as a humanitarian nation, especially one sympathetic to the plight of refugees, only by its policies and priorities concerning the spontaneous arrival of refugees on its borders.

IV.

Functions and Limits of the Existing Protection System

*The International Committee of the Red Cross and the Protection of Refugees**

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In this paper, we will first explain the structure of the International Red Cross; second, outline international humanitarian law concerning refugees as civilians affected by conflict; and third, examine the mandate and role of the International Red Cross in helping refugees under such legislation.

The International Red Cross is a three-pronged organization. The first element is the International Committee of the Red Cross (ICRC), an organization made up of only Swiss citizens and dealing exclusively with situations of armed conflicts. The second body is a mass of no fewer than 146 national Red Cross or Red Crescent Societies. These societies deal primarily with peace-time activities. The third element of the International Red Cross is the League of Red Cross and Red Crescent Societies, a federation of all the national societies, which deals primarily with peace-time activities and natural disasters. Against this background, let us clarify the work of the Red Cross in time of war. The work of the ICRC is based on six international treaties. They are the Four Geneva Conventions of 1949, dealing with the protection of the victims of armed conflicts, and

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their two additional Protocols of 1977. The Four Conventions deal, respectively, with the wounded and sick on the battlefield and at sea, prisoners of war, and the protection of civilians. The two additional Protocols deal, respectively, with international conflicts and non-international conflicts. What we refer to today as international humanitarian law is made up of these six instruments.

Are Refugees Protected in International Humanitarian Law?

In international humanitarian law, there is no specific definition of refugees. The refugee is protected under the Four Conventions because he or she is considered as a civilian. The Fourth Geneva Convention of 1949 limits itself, in fact, to setting the absence of protection by any government as a criterion. In other words, the term 'refugee' is given a rather broad connotation.

First of all, it is any person who flees his country owing to a well-founded fear of persecution within the meaning of the United Nations Convention Relating to the Status of Refugees (of 28 July 1951), its Protocol (of 31 January 1967) and the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR).

It is also any person who leaves his country fleeing an armed conflict or other disturbances within the meaning of the 1969 Convention of the Organization of African Unity (of 10 September 1969).

Finally, it is also any person who flees an armed conflict or other disturbances but remains inside his country.

Persons in the last category, commonly called displaced persons, are not considered as refugees by international law as such, having crossed no international borders. However, in common usage, they are regarded as such.

International humanitarian law provides for a two-fold protection of civilians: first, it protects civilians who are in the power of the enemy and, second, it protects civilians against the effects of hostilities.

Refugees as Civilians in the Power of a Party to the Conflict

We will begin by examining the circumstances of refugees as civilians in the power of a party to conflict. In a case of international armed conflict, special protection is afforded by some provisions of the Fourth Geneva Convention. This Convention provides for two kinds of situations. First, it provides for the situation of aliens in the territory

of a party to the conflict. Refugees who are nationals of an enemy State are protected by Article 44. In fact, within the Fourth Convention, Article 44 is the only one that really calls refugees by name and give them special protection.

Refugees who are nationals of a neutral State are protected, in the absence of diplomatic representation, by Article 4 (paragraph 1) of the same Convention. These same persons are not protected when there are diplomatic relations between the neutral State whose nationals they are, and the belligerent State on whose territory they have sought refuge (Article 4, paragraph 2). The same is true of refugees who are nationals of a co-belligerent State.

Second, the Fourth Convention provides for situations of occupation. Refugees who are nationals of an enemy State are protected by Article 70 (paragraph 2); those who are nationals of a neutral State are also protected (under Article 4, paragraph 1, the existence or not of diplomatic relations being of no relevance in such a case).[1] Refugees who are nationals of co-belligerent States are protected (under Article 4, paragraph 1) in the absence of diplomatic relations. However, they are not protected if diplomatic relations do exist between the co-belligerent State, whose nationals they are, and the belligerent State on whose territory they find themselves.

Special protection is afforded by Article 73 of the Additional Protocol I, adopted in 1977 to fill a number of loopholes left open in the Conventions.

In Additional Protocol I, a special protection is also granted by Article 73. This provision complements and extends the protection granted by the Fourth Convention (in Articles 44 and 70) to people who, hitherto, were not protected. Provided that they have been considered as refugees before the beginning of hostilities under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or the State of residence, such people include refugees who are nationals of a State not bound by the Fourth Convention; who are nationals of a neutral State that has diplomatic relations with the State in whose power these refugees find themselves (refugees in occupied territory already protected by the Fourth Convention are not affected by Article 73); who are nationals of a co-belligerent State having diplomatic relations; who, as nationals of the occupying State, find themselves in occupied territory (they were previously protected only by Article 70, paragraph 2 and not by the Fourth Convention as a whole).

Thus, the provisions of the Fourth Convention and of Protocol I afford protection to refugees without specific reference to the category of refugees as such. Refugees are, as mentioned above, primarily regarded by humanitarian law and by the ICRC as civilians, and it is

as civilians that they can be granted a rather wide protection and the benefit of a whole array of provisions.

Other provisions, though more general, give certain powers and rights to the ICRC, enabling it to take action in favour of refugees. In the Fourth Convention, Article 25 gives the ICRC the possibility to do work in exchanging family news; Article 26 allows the ICRC to work to reunite dispersed families; Article 140 gives the ICRC a specific mandate to run the Central Tracing Agency which tries to reunite families split by armed conflicts; and Article 143 gives the ICRC a general right to visit protected persons. In Protocol I, Article 33 deals with missing persons and Article 74 covers the reuniting of dispersed families.

Having considered the situation concerning international armed conflicts, let us turn our attention to non-international armed conflicts – a much more difficult consideration. In a situation of non-international armed conflict, the refugee has a *de facto* status of a "person displaced within his own country". He is, in any case, protected by the minimum standards laid down in the Fourth Convention concerning respect to be shown for persons not taking part in hostilities, in other words, civilians (Fourth Convention, Article 3; Protocol II, Article 4).

Refugees as Civilian Victims of the Effects of Hostilities

Part 2 of the Fourth Convention also protects refugees against certain effects of hostilities. This protection is conferred by a number of rules concerning the creation of prospected zones (Article 15, Convention IV and Article 60, Protocol I); the provision of relief consignments (Article 23, Convention IV and Article 70, Protocol I); child welfare (Article 24, Convention IV); and the prohibition of attacks or threats against civilians (Articles 48 and 51, Protocol I and Article 13, Protocol II). In addition, combatants on all sides have an obligation under Protocol I (Articles 57 and 58) to take serious precautions to spare civilians. The destruction of objects indispensable to the survival of the civilian population, such as foodstuffs and agricultural areas, is also prohibited (Article 54, Protocol I and Article 14, Protocol II).

The Refugee as a Person Benefiting Specifically from ICRC Action

Let us now turn our attention to the refugee as a person benefiting from ICRC action. In order to be eligible to benefit from such action,

the refugee must in principle be the victim of an internal or an international armed conflict. Whether he or she belongs to the category of persons protected by international humanitarian law is not, however, a crucial point. The ICRC's right of initiative, which will be examined below, makes it possible to intervene in situations that are not covered by international humanitarian law or whose legal definition, and hence the applicability of international humanitarian law, are in dispute. Obviously, if the refugee belongs to the category of protected persons, he or she will, in any case, be entitled to benefit from ICRC action.

It should be remembered that there are three forms of action that the ICRC can take:

1. protection, especially in the form of visits to detainees;
2. assistance (that is food aid, provision of shelter, clothing and medical care); and
3. Central Tracing Agency activities, registration, exchange of family news, reuniting of families.

The legal basis for activities carried out by the ICRC in favour of refugees is to be found not only in the Conventions and Protocols, but also in the Statutes of the International Red Cross and Red Crescent Movement, the Statutes of the ICRC and various Resolutions adopted by International Conferences of the Red Cross.

Moreover, as noted above, the ICRC is explicitly assigned competence on the basis of Articles 140 and 143 of the Fourth Convention to visit protected persons and carry out tracing activities. A most important basis is provided by the 'right of initiative' of the ICRC. This allows the ICRC to take any measure it deems necessary by the humanitarian needs of the moment. These provisions give the ICRC the right not merely to make proposals but to act. The ICRC's activities are based largely on this right of initiative, whether in aid of victims of conflict in general, or in aid of refugees. The basis for this right in the case of refugees is to be found in Article 10 of the Fourth Convention and Article 81 of Protocol I.

In a non-international armed conflict, the right of initiative is based on Common Article 3. This article is found in the Four Conventions and is the only provision in these Four Conventions that deals with non-international conflicts. It is a rather lengthy article but in essence it is a mini-convention, a reduction of the whole convention to its most fundamental principles and is applicable in every situation that is not an international war. In other words, whenever there is a conflict that is not of an international nature (which is the majority of all conflicts today) then Article 3 acts as a safety net.

Under the Statutes of the International Red Cross Movement, the ICRC endeavours at all times to ensure the protection and assistance of military and civilian victims of war, civil war or internal strife and their direct results (Article 5, paragraph 2d). Most ICRC activities in aid of refugees are based on the right of humanitarian initiative as laid down in Article 5, paragraph 3. Under its own Statutes, the ICRC also takes action to come to the help of refugees (Article 4). In 1981, the Twenty-Fourth International Conference of the Red Cross (Manila) adopted for the first time a resolution setting out the role played by members of the International Red Cross without being linked to a specific situation. The word refugee in the resolution's title should be interpreted in its broadest sense. Indeed, the resolution applies equally to refugees, persons displaced inside or outside their country and repatriated persons.

Specific Nature of ICRC Action in Favour of Refugees

Finally, let me say a word about the specific nature of ICRC action in regard to refugees. The role of the Red Cross in relation to the UNHCR was defined in the Manila Resolution referred to above. It should be noted that under international law the pre-eminent function in providing international protection and material assistance is assumed by the UNHCR.

As we have seen, the ICRC takes action in favour of refugees whose condition as such is due to an armed conflict. In other words, the ICRC (and the National Red Cross Societies) have a primary competence in the case of internally displaced persons. Angola, Ethiopia and El Salvador are examples of countries where the ICRC works on behalf of persons displaced by a conflict inside their own country.

Conversely, the protection of and assistance to refugees in countries of first asylum and host countries is first and foremost the task of the UNHCR.

In border areas where refugees are the victims of armed attacks, the ICRC (and the National Red Cross Societies) see to the protection of the population of the camps located there. It can be said that in such cases the UNHCR and the ICRC have a concurrent competence. The Khmer-Thai border and Pakistan are two examples of ICRC activities on behalf of persons displaced by a conflict outside their own country (or on its borders).

The scope of the ICRC's statutory right of initiative in favour of refugees is extensive, owing to the purely humanitarian nature of its mission. As mentioned above, it enables it to intervene in situations not covered by the Conventions. Thus, the ICRC has been able to take

action in countries where the government had not requested help from any other organization, governmental or non-governmental. The Red Cross can act quickly because it is flexible. The UNHCR can act quickly, too, but it must first receive a request to that effect from the government of the refugees' country of asylum.

If the refugee belongs to the category of persons protected by international humanitarian law, protection is provided by the ICRC in the following manner:

- The ICRC is authorized by Article 143 of the Fourth Convention "to go to all places where protected persons are, particularly to places of internment, detention and work . . .". This function is particularly important when the refugees are in detention, whether in prisons or in camps.
- The ICRC ensures respect for the rules of international humanitarian law relating to protected persons.
- The ICRC, through its Central Tracing Agency, registers protected persons, exchanges family messages and arranges for families to be reunified.

In other cases, the action of the ICRC tends to be directed toward the physical protection of refugees to safeguard their life and physical integrity.

In situations that are primarily of the competence of the ICRC, the victims receive the assistance that corresponds to their needs. In situations involving the ICRC's and the UNHCR's concurrent competence, the ICRC puts the emphasis, in co-operation with the UNHCR, on its traditional activities of providing medical aid.

Notes

1. Geneva Convention of 1949 relative to the protection of civilian persons in time of war: Commentary, published under the direction of J.S. Pictet, Geneva, ICRC, 1956, p. 48.

Refugees: The Functions and Limits of the Existing Protection System

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The office of the United Nations High Commissioner for Refugees (UNHCR) was established by the General Assembly in 1950 with two principal functions: to provide international protection to refugees as defined in the Statute, and to seek permanent solutions to their problems.[1] The office was conceived initially as a temporary institution, but its mandate as a non-permanent, subsidiary organ of the General Assembly is now regularly renewed. Refugees, too, remain on the international scene, and the responsibilities entrusted to the UNHCR show few signs of diminishing.

At the same time, the overall responsibility is spread more widely, both within and beyond the United Nations system. Intergovernmental organizations, the International Committee of the Red Cross (ICRC), National Red Cross Societies and other non-governmental organizations all play an essential role in meeting humanitarian needs in emergency situations. The ICRC, in particular, is often able to provide protection and assistance in highly politicized situations where the United Nations, for whatever reason,

* The views expressed in this paper are the personal views of the author and do not necessarily reflect the views of the United Nations or UNHCR.

is unable to become involved; a recent example is the Thai border program for Kampucheans (Gordenker 1987, 101-5; Shawcross 1984).

There are some 70 to 80 million migrants in the world, of one category or another; of these, some 10 to 12 million are believed to be refugees and displaced persons. One major preoccupation today focuses precisely on the question of who are refugees; to this is added debate on the extent of the legal obligations owed to them and on the principles or standards, if any, that govern the treatment of other groups in similar situations of humanitarian necessity. The question of definition or description is important from the outset, for it is with this reference that limits can or may be set for the existing system of protection.

The content of the term 'displaced persons' remains uncertain, if not ambiguous, as does the level of protection or assistance that may be due. Initially the term was employed to ease the way for the inclusion of the internally displaced within assistance programs for returning refugees. Its range was generally limited to those displaced within their own country by a 'man-made disaster', while the classification 'refugee' extended to all who had crossed an international frontier, whether as a consequence of a man-made disaster or because of a well-founded fear of persecution. Now, however, both refugees and displaced persons are included in protection discourse and in the context of such traditional answers to external flight as voluntary repatriation. The language of General Assembly resolutions is not consistent, however, and there are apparent divergences in respective entitlements to protection and assistance. The answers to these questions must therefore be found in the realm of need and situation, as well as in the underlying rationale for the General Assembly's endorsement of UNHCR activities.

UNHCR's statutory competence extends to refugees who have a well-founded fear of persecution for reasons of race, religion, nationality, or political opinion, and this is matched almost exactly by the category recognized now by the 104 state parties to the United Nations Convention Relating to the Status of Refugees and its Protocol (1951 Convention/1967 Protocol). UNHCR's competence in Africa has been recognized as extending also to refugees who have fled owing to external aggression, occupation, foreign domination or events seriously disturbing public order. This is confirmed in the practice of states and has been explicitly endorsed in Article I(2) of the 1969 OAU Convention, to which 34 states have acceded.

UNHCR's mandate in Central America is of similar dimensions: it was confirmed in the 1984 Cartagena Declaration, which includes as refugees those who qualify under the 1951 Convention/1967 Protocol, as well as those who have fled because their lives, safety or freedom have been threatened by generalized violence, foreign

aggression, internal conflicts, massive violations of human rights, or other circumstances that have seriously disturbed public order. The Declaration is not a formally binding legal instrument, but it indicates the willingness of the States involved to follow certain practices in the matter of refugee definition and protection that are broadly complementary to UNHCR's activities.

The Executive Committee of UNHCR has also repeatedly endorsed the scope of the mandate of the Office. In 1980, for example, it noted with concern the continuance of large-scale movements of uprooted individuals and groups seeking refuge from man-made disasters, stressed the necessity for co-ordination among UN bodies concerned with man-made emergencies and emergencies involving refugees and displaced persons in refugee-like situations, and "emphasized . . . the leading responsibility of [UNHCR] in emergency situations which involve refugees in the sense of its Statute or of General Assembly resolution 1388(XIV) and its subsequent resolutions" (UNHCR Executive Committee 1980, paras. 29.A(c), 29.B(c)(e)(f)). The other resolutions cited by the Executive Committee tracked the High Commissioner's good offices work in securing contributions for assistance to refugees not within the competence of the UN, its development to include protection and assistance activities, and eventual recognition of a general responsibility to seek solutions to the problems of refugees and displaced persons of concern to UNHCR, wherever they occur.[2]

There is, however, a disjuncture between the obligations of States and the competence and responsibility of UNHCR. It is most clearly apparent with respect to refugees other than those with a well-founded fear of persecution or who come within regional arrangements, but who are nevertheless of concern to UNHCR. States' reservations as to a general widening of the refugee definition have latterly confirmed the divergence between the functional responsibilities of UNHCR and the legal obligations of States.

Migration, particularly coerced, involuntary and often uncontrolled migration, is currently a major cause of concern to a number of States. In some respects this is surprising, for the refugee situation worldwide has been fairly stable for some time. UNHCR reports prepared for the October 1987 session of the Executive Committee, for example, note that new influxes have been offset by organized and spontaneous repatriation movements, while a number of long-standing flows appear to be diminishing.[3] Whatever the statistical situation, fundamental problems relating to the protection of refugees persist. Their lives and freedom continue to be endangered by armed and military attacks, by assaults and abductions on the high seas, and by failure to rescue. Refugees and asylum-seekers[4] are still sent back to where they may be persecuted; they are detained, often

for purely deterrent purposes, and excluded from procedures for the determination of refugee status. During the protracted wait for decisions, they may also be bound by restrictions on work, education and freedom of movement (UNHCR 1987a). Moreover, many of them are motivated to move on from the countries where they first found refuge or protection.

Since 1985, many Western European and other States have attempted to stifle 'unauthorized' or spontaneous movements into their territories. The numbers arriving in Europe, which have included refugees, asylum-seekers, and those attempting to exploit refugee processes in order to gain admission, have indeed increased. The figure rose from 170,000 in 1982 to 202,000 in 1986, with the majority arriving in the Federal Republic of Germany (99,650 in 1986, up from 73,850 in 1985), followed in 1986 by France (23,450), Sweden (14,000) and Denmark (9,300). A further relevant factor in the delineation of the Western European response has been the fact that between two-thirds and three-quarters of new arrivals have come from non-European countries, such as Sri Lanka, Iran, Ghana, Afghanistan, Zaire and Ethiopia. In some cases, they have moved on from countries of transit or first refuge; in others, they are fleeing circumstances which, it is argued, do not bring them within established refugee categories.

The reaction among the receiving nations of the North, many of which were among the pioneers of refugee protection, has been, at first unilaterally but now with increasing co-ordination, to attempt to contain or 'regionalize' refugee problems; that is, to keep those in need of protection and solutions within their regions of origin. This objective is pursued by the imposition of visa and transit visa requirements; by sanctions against airlines that carry undocumented or otherwise inadmissible passengers; by socio-economic measures of deterrence, such as prohibiting employment or limiting social benefits; by accelerating refugee status procedures, even to the point of determining applications prior to disembarkation; and by procedural devices designed to avoid decisions on the merits in favour of rapid removal to some other country deemed to be responsible or secure, or on the ground that the applicant for asylum has spent too long in transit or could have sought protection elsewhere.

In practical terms, these measures may appear to affect only a small number of refugees. The have little bearing on the situation of Afghans in Pakistan and Iran or on the overall number of refugees in Africa; they are unlikely to help or hinder resolution of the major refugee problems in Central America or Southeast Asia. On the other hand, they do expose the limits of the existing international system of protection; by merely moving problems sideways, or by leaving them regionalized and unresolved, such measures contribute nothing to

meeting the responsibility of the international community to find solutions to the problems of refugees. In addition, even if they are of immediate utility and a palliative to short-term national concerns, they are likely to cause long-term damage to the established principles and practices that are the foundation of that very system.

This paper describes the present system from an institutional and a juridical perspective. It goes on to focus on the functions of that system, the meaning and content of protection, and the relation of protection to solutions. The limits to the protection function are analyzed with regard to conceptual, substantive and institutional aspects; here it will be seen that there are important gaps or grey areas between the concepts of refugee, refuge, asylum and solutions. Finally, brief consideration is given to remedying the current situation, both by attending to the causes of flight and by bridging the gap between institutional responsibilities and the responsibilities and legal obligations of States.

1. Nature of the Existing System of International Protection

(1) Institutional bases

In the present system of world organization, the United Nations is the focal point for the resolution of the problems of refugees (cf. UN Charter, articles 14, 24, 29, 34). Since the time of the League of Nations, international agencies have been entrusted with responsibility for providing legal, political or international protection to refugees, and although none of the instruments or arrangements of the period explicitly declared what was meant by protection, the notion was clear from the context of operations. Refugees were themselves defined by groups and categories outside their country of origin and not enjoying the protection of their government. The international protection they needed was 'legal', in that it related to their status, rights and interests; and it was 'political', in that the situation and problems of refugees required presentation to governments at the political level, if the requisite measures of assistance and the necessary solutions were to be found.

UNHCR is thus a successor to many agencies that have operated in the international protection field; as the representative of the community of nations, it benefits today from a history of practice and legal development that has not only established refugees as a class known to international law and confirmed the principle of *non-refoulement*, but also established the general entitlement of an inter-governmental body to exercise protection on their behalf.[5] The United Nations is responsible, but the effective provision of protection is

necessarily dependent on joint endeavours.[6] Thus, in resolution 428(V) in 1950, the General Assembly called upon governments to co-operate with the Office in the performance of its functions, in ways that more or less paralleled those addressed to the High Commissioner in paragraph 8 of the Statute.[7]

The 1951 Convention and the 1967 Protocol open the way to interventions on behalf of refugees in respect to a variety of claims or rights. States that are parties to these instruments and to the 1969 OAU Convention undertake to accord a certain protection and standard of treatment to refugees, to co-operate with UNHCR in the performance of its functions, and to facilitate its duty of supervising the application of those instruments (1951 Convention, article 35; 1969 OAU Convention, article viii; Goodwin-Gill 1983, Annexes iv and viii).

The ideal of co-operation is most evident where UNHCR participates in national procedures for the determination of refugee status, which are crucial in securing the effective application of the Convention and Protocol. UNHCR's involvement allows the Office, on behalf of the international community, to monitor closely matters of status and the entry and removal of asylum-seekers, and to keep itself informed of such emergent problems as may undermine protection principles. Whatever the procedure or the degree of participation, the fundamental goals are always the same – identifying those who should benefit from recognition of their status and ensuring, so far as is practical, consistent and generous interpretations of essentially international criteria. The duty to provide protection may also involve UNHCR in actively assisting those unable, for one reason or another, to help themselves, for example, where trauma, minority or other circumstance frustrate the adequate presentation of a case; where information is lacking on the background to flight; or where technical or procedural grounds limit the possibilities for a fair and expeditious hearing. In these and other ways, States and UNHCR combine to ensure effective implementation of international obligations and the objectives of protection.

UNHCR is the principal international agency charged with protecting refugees but frequently works with various intergovernmental organizations; in certain areas, UNHCR's responsibilities are in fact delimited by those of other competent agencies, such as the United Nations Relief and Works Agency for Palestinian Refugees, the Office of the United Nations Disaster Relief Co-ordinator, and the United Nations Border Relief Office. The successful delivery of assistance to refugees necessitates close collaboration, both to meet emergency needs and to help find solutions. Hence there has been increased emphasis in recent years on improving co-ordination with UNICEF, UNDP, ILO, WHO, the

World Food Programme and the World Bank. The protection component of such joint endeavours may not always be apparent, for example, where the primary objective is assistance or self-sufficiency, but it can sometimes be the immediate goal, as in collaboration with the International Maritime Organization in promotion of rescue at sea.

It should not be forgotten that UNHCR is part of the United Nations Organization. Article 55 of the UN Charter binds the organization as a whole to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." This gives the Office its context – the general objectives, purposes and principles from which it cannot be isolated. Co-operation is therefore required with those United Nations agencies whose activities complement the protection role of UNHCR, such as the Commission on Human Rights. UNHCR has certain specific responsibilities in regard to the human rights of refugees, which mean that it must focus on both the causes of flows, to determine who is within the mandate, and the substantive rights of those who have fled.

There are limits, however, to UNHCR's human rights role. These are, first, jurisdictional, in the sense that UNHCR's interest is refugee-specific; and second, functional or pragmatic, in the sense that ways and means must be found for modelling UNHCR's contribution so as to accord with its non-political and humanitarian mandate and to fit within existing mechanisms of investigation and adjudication. There is nevertheless plenty of scope for effective co-operation with regional human rights organizations, such as have been established under the American and European Conventions on Human Rights, or with other organizations that have a specific protecting role in particular contexts, such as the International Committee of the Red Cross. Human rights concerns frequently present a commonality of interest, which must be exploited to the advantage of the refugee.

Finally, paragraphs 8(h) and 8(i) of the UNHCR Statute refer to the High Commissioner establishing contact with private organizations and facilitating co-ordination of the efforts of organizations concerned with the welfare of refugees. Non-governmental organizations (NGOs) have been assisting refugees since the time of the League of Nations, and their role was recognized early by the General Assembly, particularly with regard to migration and employment (UNGA res. 639(viii), 20 December 1952). Their contribution in the field of reception and integration expanded with the resettlement movement in the 1970s, but NGOs also acted increasingly as operational partners in delivering assistance and thus came into the protection field.[8]

UNHCR's report to ECOSOC and the General Assembly in 1986 recorded that the implementation of roughly one-third of assistance programs was in the hands of national or international NGOs, which also played a major advocacy role in donor and resettlement countries.[9] The "valuable contribution" of NGOs in supporting UNHCR's protection efforts has been accepted (UNHCR Executive Committee 1986, paragraph 125(i)), but so far with little reference to the extent of their active engagement beyond the context of assistance and development. This is surprising when one considers the degree to which NGOs are in fact involved, both in general debate and in the practical issues of advice and assistance.[10]

First, many NGOs are active in the field of human rights fact-finding and commonly share with governments and UNHCR, on request and at their own initiative, the results of their inquiries.[11] Such information on conditions in countries of origin can be of critical importance in determining questions of refugee status. Secondly, especially in many developed countries with established procedures, NGOs commonly act as the first line of defence for the asylum-seeker. Not only do they serve as advocates in a general sense, but they also provide legal advice and assistance with the presentation of cases before national decision-making bodies. The importance of this role should not be underestimated; legal process is frequently complicated, and without the co-operation of NGOs, UNHCR's resources would be inadequate to ensure protection. By their actions NGOs can ensure that refugees and asylum-seekers enjoy minimum rights to counsel, to equality before the equal protection of the law, and to fair hearings and effective remedies. Finally, NGO involvement in program delivery frequently places agency staff in a *de facto* protection role, often at personal risk.[12]

Institutionally, the existing system of protection thus comprises disparate contributions by international organizations, States, regional human rights mechanisms and non-governmental organizations. Except insofar as UNHCR remains specifically charged with protection responsibilities and bases its activities on instruments of a near-universal character, the system remains the sum of its component parts. In particular, States, NGOs, and occasionally other international agencies may each claim, if not a monopoly, then a valid (and not just a strategic) interest in the interpretation and application of international criteria. United Nations and regional human rights mechanisms also contribute to the development and refinement of rules and concepts that assist directly and indirectly in the protection of refugees, even if from time to time they add to a situation of conflict and uncertainty.

(2) The juridical bases

The juridical bases for the existing system of protection are broadly divisible into four: (1) the constituent instruments of the principal international agencies charged with the protection of refugees or related functions; (2) regional and multilateral conventions binding States to accord to refugees as defined therein certain rights and standards of treatment or, in the human rights domain, to assure certain rights to all persons within their territory; (3) the rules and standards of general or customary international law regulating relations between States (and thus contributing to solutions) or limiting freedom of action (in regard to both refugees specifically and the treatment of persons generally); and (4) national legislation or implementing measures.

The legal tools available to UNHCR include its Statute; successive General Assembly and ECOSOC resolutions; multilateral and regional treaties on human rights or particular refugee problems; customary international law; the 1951 Convention/1967 Protocol, under which UNHCR has co-operative and supervisory functions; national laws and procedures (especially where UNHCR has a defined role); and, in appropriate cases, the decisions of the Executive Committee and its conclusions on protection. UNHCR's general functions, such as the promotion of conventions, the conclusion of agreements with governments to reduce the number of refugees needing protection, promoting admission and assisting governmental and private efforts to achieve solutions, are complemented by its specific protection activities on behalf of individuals and groups of concern to the Office.

The principal refugee treaties accord a special role to UNHCR, the major features of which have been mentioned above. The Office has a legal interest in their interpretation and application, in questions of refugee status and treatment, and in ensuring respect for the rights and benefits extended to refugees. Notwithstanding the statutory injunction that the work of the High Commissioner "shall relate, as a rule, to groups and categories of refugees" (UNHCR 1950, paragraph 2) the individual elements of the conventions necessitate frequent involvement in particular cases, a practice long accepted by governments. UNHCR's protection responsibilities are neither limited nor circumscribed by treaty, but extend equally to all other areas of rights and interests that bear on the situation of the refugee and the search for solutions.[13]

The refugee treaties are concerned with definition or status, with certain critical entitlements such as *non-refoulement*, exemption from penalties for illegal entry, restrictions on expulsion, and with minimum standards of treatment due, in particular, to the lawfully resident refugee. Human rights instruments, both universal and

regional, are broader in scope. UNHCR has no formal role in such arrangements, but its overall responsibility for refugees gives it an interest in the norms thereby established. One advantage is that human rights treaties are not generally or formally limited to particular classes of persons. Their initial focus on the rights considered so fundamental as to extend regardless and without derogation to everyone, mitigates technical problems of status in favour of a broad mandate. At the same time, the concretization of specific rights helps to delineate the competence of the Office.

Customary international law is of relevance to UNHCR's protection role in two respects. First, it confirms the legal standing of the Office generally to exercise its protection function. Second, it incorporates the core elements of the refugee definition in elaboration of a class of refugees at large, as well as the basic principles of protection reflected by *non-refoulement* and fundamental human rights. The latter fall within the class of obligations owed by States to the international community at large.[14] They are owed irrespective of ratification of treaties and apply equally to nationals, non-nationals, refugees and asylum-seekers; the existence of such obligations, where refugees are concerned, is matched by the existence of an international agency mandated specifically to provide international protection.

The UNHCR Statute was not adopted unanimously but by a vote of 36 to 5, with 11 abstentions. Over the years, States have increasingly acquiesced in the right of the Office to exercise protection, and today resolutions on UNHCR and on refugees tend to be adopted by consensus; the assumption is that refugee problems are the concern of the international community[15] and that UNHCR, by express agreement of some States and the acquiescence of others, is the qualified representative in the matter of protection. The protection function, considered with regard to the legal interest of UNHCR, the class of persons and the rights to be protected, thus clearly has its place within the body of general or customary international law.

2. The Functions of Protection

(1) The nature of protection

UNHCR was conceived in a human rights context that has been amplified over the years in General Assembly resolutions; these have dealt not only with the range of persons within UNHCR competence, but also with the action to be undertaken by the Office.[16] Two fundamentals are apparent: the fundamental nature of the international protection function and the fundamental rights of those

of concern to UNHCR. Clearly, UNHCR is an operational agency with specific, if not general, responsibilities in the human rights field. The Statute binds the Office to provide international protection, and this involves not merely respecting the rights of refugees in a passive sense, but also actively taking the fact of their being refugees, their needs and sufferings, as necessary and sufficient reasons for action. It includes supervisory and promotional activities, the development of appropriate projects to ensure or improve protection (ranging from legal aid schemes to anti-piracy programs and rescue at sea incentives), as well as rights-based interventions *vis-à-vis* governments. An active role is demanded on behalf of a prescribed class of persons, but the human rights competence of the Office in respect of that class is unrestricted, whenever a sufficient connection is established with the mandated objectives of providing protection and seeking solutions.

The rationale for protection lies in the refugee's right to life, liberty and security, which may be jeopardized by disregard of the principle of refuge. At this level there is no essential difference between the claim of one who has a well-founded fear of persecution and one who flees civil conflict or a general breakdown of law and order; in either case, the refusal of refuge may be a critical link in the causative chain leading to violation of the right to life, liberty and security. In the field of UNHCR's responsibility, both are cases of necessity, of flight for valid reasons involving elements of coercion and compulsion.

Against the background of the UN Charter and in virtue of its standing in general international law, UNHCR occupies a pole position in the legal system of supervision and protection. The 1951 Convention and the 1967 Protocol prescribe specific functions within the scope of those instruments, but UNHCR's protection responsibilities are broader. Although the Office has no formal role under the principal human rights instruments, its field of concern starts naturally with those rights considered so fundamental as to benefit everyone and to permit no derogation, even in exceptional circumstances. These include, in addition to freedom from slavery and racial discrimination, the right to life; the right to be protected against torture or cruel or inhuman treatment or punishment (both intimately linked to the essentials of refugee character represented in flight from persecution or violence, and with the basic principle of *non-refoulement*); the right not to be subject to retroactive criminal penalties; and the right to recognition as a person before the law (with its implications for refugee status procedures). The obligations to respect human dignity and integrity also encompasses, at least generally, liberty and security of the person and protection from arbitrary arrest and detention. Again, the human rights basis

underlying UNHCR's duty to provide international protection constrains the Office, by its subject matter, to pursue a particular ideal of liberty in the formulation of its policies of protection, assistance and solutions.

(2) The relation of protection and solution

Protection involves the use of legal tools to secure the rights, the security and the welfare of refugees, but the objective, beyond the immediate needs of refugees, is solutions – either the voluntary return of refugees to their country in conditions of security or assimilation in a new national community (UNHCR 1950, paragraph 1).

In practice, protection works internally and externally, sometimes in tension. Internally, UNHCR must identify refugees and displaced persons within its mandate as a pre-condition (or *ex post facto* justification) for programs of protection and assistance. Externally, the actual exercise of the protection function can directly influence the search for solutions. Simply intervening on behalf of refugees may achieve immediate goals, such as the prevention of *refoulement* or the identification of those in need of and entitled to emergency assistance, but it is an insufficient end in itself. To be truly effective, the activity of providing protection cannot isolate itself from its objective – re-establishment of the refugee within a community – and action taken in a legal context must be comprehended and pursued with due regard to its implications in a wider political and sociological dimension. The objective of solutions also cannot displace UNHCR's autonomous responsibility towards refugees whose fundamental human rights are in danger of violation. In practice, however, political constraints often seriously limit the viability of protection as a solution-oriented activity.

Solutions were nevertheless always the objective for international action, and the lack of them the sufficient motive.[17] In 1950 the General Assembly addressed the resettlement requirements of the refugees who remained after the International Refugee Organization was wound up, "particularly those in need of permanent custodial care", and reiterated its concern for the serious unsolved problems likely to face those who had not been repatriated or resettled.[18] UNHCR activities for protection and solutions were inevitably linked in succeeding resolutions.[19] In 1955 and 1957, for example, the General Assembly recalled UNHCR's duty to seek solutions through voluntary repatriation, resettlement and integration and requested that efforts to these ends be continued "under due safeguards to be applied ... in accordance with ... responsibility under the Statute ... to provide international protection to refugees."[20]

In 1982 the General Assembly acknowledged the work done by UNHCR in examining the problems of providing refuge on a temporary basis to asylum-seekers in situations of large-scale influx. The inherent limits to this protection response were implicitly accepted; refuge in such circumstances is provided "with a view to finding durable solutions".[21] The need that triggers the duty to provide international protection and that, for States, brings into play the principle of refuge, likewise justifies and requires the provision of material assistance pending a solution.

The limits of law and organization are often apparent at the grassroots level, where UNHCR, States and refugees interact in a sometimes tense relationship of competing interests. The unifying objective of humanitarian, durable solutions can be lost in the process of protection, the very exercise and achievements of which may produce further protection problems. It is no great success, even in the short term, to have refugees confined and dependent in closed camps, in a jurisdictional limbo far removed from a true community. For these reasons, inherent limits to the protection function derive from the ultimate objectives of the system.

(3) Protection in practice

There is a limit to how far the meaning of protection can be pursued in the abstract; the outlines and the objectives can be perceived, but the function becomes concrete only in the face of specific problems and issues. Protection is nevertheless an activity; the duty to provide international protection and its integral link to fundamental human rights and to the search for solutions give it a dynamic aspect. This involves identifying situations of necessity and groups or categories exposed to risk, developing strategies and taking steps both to resolve and to prevent problems. An element of relativity is necessarily present, in that protection as understood by a refugee in a war zone may be qualitatively different from that required for the refugee seeking a way through the legal and institutional maze of a developed society. Protection must be practical but also pragmatic; different, not double, standards may be required in different situations. Protection must define itself in the light of circumstances, environment, time and place, and specific needs; here also the limits to the system may become apparent. UNHCR's task is to ensure that fundamental principles are followed and that the standards adopted in particular instances do not threaten the integrity, dignity and basic human rights of refugees.

Formal procedures for determining refugee status do not exhaust the category of protection, but are now of critical importance in some 50 of the States party to the 1951 Convention/1967 Protocol (UNHCR

1987b). States remain responsible for implementing their treaty obligations and for providing refuge; UNHCR's objective at the national level is therefore to promote the adoption of fair and efficient procedures that guarantee *non-refoulement*, timely determination of status, and respect for rights recognized nationally and at the regional or multilateral level. Effective protection requires access to procedures; internationally accepted standards prescribe the minimum procedural guarantees (UNHCR Executive Committee 1977; 1983), as well as the availability of a remedy in face of a violation, or threatened violation, of fundamental human rights.[22] UNHCR's responsibilities extend not only to promoting appropriate safeguards, but also to providing advice and assistance. Limited resources, the complexity of national systems and the principle of co-operation frequently mean that national protection agencies or NGOs are relied on.

Resettlement policies also have a protection component among their other objectives, which include providing a durable solution for refugees unable to return home or to remain in their country of first refuge. A further goal is to relieve the strain on receiving countries – sometimes in a quantitative way, sometimes in a political way – by assisting them in relations with countries of origin. Resettlement thus contributes to international solidarity and continued observance of the fundamental principles of protection.

At the level of the individual refugee, however, resettlement can mean the difference between life and death. Refugees are at times denied basic human rights in the country of first refuge; their lives and freedom may be threatened by attacks and assassinations directed from outside, or by local elements motivated by racial, religious or political differences. The authorities in turn may be unable or unwilling to offer effective protection. In such circumstances, resettlement becomes not the solution of last resort, but the principal objective.[23]

Resettlement's place in the scheme of protection has been nowhere more evident than in Indochina and is particularly well illustrated by the problems arising from rescue at sea. Here gaps in the system had to be filled by pragmatic arrangements. The duty to rescue is firmly established in treaty and customary international law.[24] The practice of disembarkation at the next or nearest port of call is unexceptionally premised upon the continuing 'protection' of the country of origin, which would ordinarily assume responsibility for repatriation. Refugees rescued at sea fall outside established rules and practices; States in the region of the South China Sea tended to refuse disembarkation without a resettlement guarantee, leading to expense and delay for shipowners and increased unwillingness to rescue those in distress. The problem of guarantees was most acute

or flag of convenience States, but also for other States unable or unwilling to offer resettlement. Notwithstanding calls for temporary admission (UNHCR Executive Committee 1978, para. 38E), refusal of disembarkation itself could not be characterized as breach of an international obligation, provided it did not lead to *refoulement*. Practical protection and a realistic appraisal of the various competing interests were eventually combined in the Disembarkation Resettlement Offers scheme (DISERO), which took account of the notion of flag State responsibility, the special situation of ships flying flags of convenience, and the particular demands of coastal States. Above all, by institutionalizing resettlement guarantees and disembarkation procedures (thus linking flight to solution), the DISERO scheme effectively enhanced the protection of the refugee.[25]

Paradoxically, UNHCR's duty to provide international protection also pervades the field covered by cessation of refugee status and voluntary return. The voluntary character of repatriation is thus the necessary correlative to the subjective fear that gave rise to flight; willingness to return negatives that fear, but it requires equal verification. The act of will is also essential as evidence of abandonment or conscious surrender of the particular legal interest that lies in the status of refugee and in its concomitant rights and interests. Cessation of refugee status, objectively considered, depends further on the existence of changes in the circumstances that formerly generated flight. Such changes themselves require verification, especially in the context of mass influx, where the subjective element of fear is less central or even absent from the process of characterizing the cross-border movement as a refugee flow.[26]

Both the facilitation and the promotion of voluntary repatriation fall within the province of UNHCR, and the right to return to one's own country locates such efforts squarely in a human rights context.[27] To ignore this dimension, and other legal implications arising from the concept of nationality, would be to condone the institutionalization of exile at the expense of fundamental human rights. A legal context for protection in voluntary repatriation is offered by article V of the 1969 OAU Convention, and the potential for an active UNHCR role has been further developed by the Executive Committee in conclusions adopted in 1980 and 1985. It was recognized in particular that UNHCR should have direct and unhindered access to returnees, in order to monitor fulfillment of such guarantees as may have encouraged them to repatriate. A cautious distinction between facilitation and promotion is nevertheless justified. The former presupposes an informed and voluntary decision by an individual, while the latter anticipates varying degrees of encouragement by outside bodies. For UNHCR, the principal consideration in a promotion context must be the interests of the refugee and the

protection of his or her rights, security and welfare; coercion or compulsion are incompatible with dignity and integrity.

UNHCR must therefore obtain the best available information regarding conditions in the country of origin and an accurate analysis of the extent to which the causes of flows have modified or ceased. Such information must in turn be shared with refugees and the governmental and non-governmental agencies involved, including repatriation commissions and implementing partners. UNHCR's duty to provide international protection clearly obliges the Office to refrain from promotion where circumstances have not changed, or where instability and insecurity continue. Similarly, the Office must not only oversee the application of such guarantees or assurances as are integral to the process of return (by being there, by close contact with returnees and implementing agencies, and by activating regional political and human rights mechanisms), but must also contribute morally and materially to successful re-integration in the national community.

A distinction is sometimes drawn between UNHCR's protection and assistance functions, particularly in light of the additional humanitarian activities periodically entrusted to the Office. Historically, UNHCR's initial role for refugees not within its immediate competence was confined to the transmission of funds.[28] Similarly, its humanitarian role in many divided countries (for example, Nigeria during the civil war, Cyprus after the Turkish invasion, Vietnam and Laos before April 1975) did not allow for protection in the traditional sense of the substitution of international for national responsibilities. As recognition of UNHCR's increased role grew, however, so protection and assistance activities also began to mingle, particularly with the extension of programs to cover returnees and the internally displaced.[29] UNHCR's protection role in the voluntary repatriation context can now be seen as essential to the fulfillment of its mandate.

UNHCR, it has been said, cannot extend direct physical protection to refugees, for this must remain the primary responsibility of States where refugees find themselves. The Office has no secure place of asylum and no formal way to extend such protection, and the statement rightly stresses the role and responsibility of governments. But it also begs many questions and understates the positive contribution that can be made in the field of physical protection; these efforts would be complementary to those undertaken to promote effective national measures. For example, refugees are often exposed to danger during flight, particularly in areas of military activity. UNHCR has used roving protection officers, for example, along the border between Honduras and El Salvador, to guide new arrivals to places of safety. In other circumstances, the Office has secured the

establishment of safe havens, particularly for refugees awaiting enforced departure from their country of asylum.[30] Both are a natural and necessary expression of the duty to provide protection; being there is often the most potent defence of the rights of refugees.

UNHCR programs for victims of violence (including rape, torture and other forms of persecution) can also be seen as a natural and practical extension of the protection function, oriented towards re-integration of the individual and thereby towards a durable solution. UNHCR must likewise use its best endeavours to ensure that refugee camps, settlements and centres are indeed places of safety. This involves questions of location – which should be determined in light of the security of the refugees and yet remain accessible – as well as the possibility of armed attacks, whether from within or outside State territory. Internal policing may be required, as well as external protection against harassment or forced recruitment. UNHCR does not have the forces to achieve these ends, but its clear legal interest in the rights, safety and welfare of refugees entitles the Office to have access to camps and, where appropriate, to maintain a regular presence.

3. The Limits to the Existing System

The existing system of international protection has its limits and is incomplete. Again, it is helpful to classify at least some of these limits as institutional, conceptual, and substantive, although problems and issues are often linked or otherwise overlap.

The 1951 Convention itself contained significant limitations of scope and content. Most States wanted the 1 January 1951 deadline, so that for many years the definition of a Convention refugee was limited to those whose well-founded fear of persecution derived from events prior to that date. Other States were equally keen to limit the scope of the definition to events occurring in Europe. Delegates were wary about signing a blank cheque in favour of no one knew how many refugees in Asia and elsewhere. Others saw their main objective as settling the legal status of refugees in Europe; regional problems in other parts of the globe could be dealt with in due course by additional regional instruments.

The 1951 Convention, in original purpose and intent, was essentially an instrument to establish, confirm or clarify the legal status of a known population of displaced persons. In the context of contemporary aliens legislation, it was essential to declare the rights necessary for living and for integration. At the same time, political circumstances allowed participating States to take a position on persecution and to proclaim the principle of *non-refoulement*. Significantly, most, though not all, the provisions are premised on

lawful residence or tolerated presence, and are targeted on assimilation. There is nothing on asylum, on admission, or on resettlement.

What the 1951 Convention has become, on the other hand, is something else. The 1967 Protocol dispensed with the time limit, and geographical limitations have largely fallen by the way. More than that, however, the 1951 Convention has become a symbol by reason of its core content, so that it represents the essence of protection, considered as an active endeavour on behalf of unknown, unknowable numbers. In nearly four decades of practice by UNHCR and States, procedural standards have been refined, generous asylum policies have benefited a broad class of refugees, and solutions have been found for millions of refugees and displaced persons. Not all the gaps were covered, however, and grey areas are now revealed in the fields of institutional competence, responsibility and obligation, conception and substance.

(1) Institutional limits

The United Nations system comprises a variety of agencies and other organs with varying responsibilities defined in their respective mandates. UNHCR's role in the international context is set out in its Statute, prescribing the functions of the Office and the beneficiaries of its operations. Both have been given a verifiable context in the daily work of protection, and both have likewise developed beyond the strict letter of the law. The evolution has taken place, nevertheless, within the field allowed by certain external constraints. There is, first, a limit to how far the notion of a refugee can be stretched. Second, there are the competing functional responsibilities of other international organizations (for example, UNICEF's role for mothers and children; UNDRO's role in natural disasters; UNDP's role in development). Third, there are financial constraints that, because of UNHCR's reliance upon voluntary contributions, may restrict or prevent certain activities otherwise necessary for the better protection of refugees. Finally, UNHCR's effectiveness is necessarily conditioned by the fact of the sovereignty of States. Thus, no assistance program can be initiated unless by invitation and agreement of the State in which it will be run.[31] Likewise, no State is bound to admit UNHCR personnel. The protection that can be provided without presence is likely to be less than usually effective.

The UNHCR Statute betrays a further disjuncture between duty and aspiration in the very words that attribute responsibility: to provide protection, but merely to seek permanent solutions for the problems of refugees. There is finally no true equivalence between

national protection and international protection; both refuge and solutions must be sought upon the territory of States.

(2) Conceptual limits

There is a limit to the meaning of words. Refugees are the business of UNHCR, and the conception of a refugee certainly exceeds the particular notion described in the 1951 Convention/1967 Protocol or in the Statute of the Office. The international community has thus responded pragmatically to the protection and assistance needs of other refugees, in successive General Assembly and Executive Committee endorsements of UNHCR programs. Resolutions and conclusions have expressed concern, and to some extent, even when retrospective, have contributed to the development of policy; their weight in the norm-creating process, however, is relative to the practice of States and the sense of obligation. Current restrictive measures are evidence of specific limits in the existing protection system, related to certain identifiable problems. They exploit the gap between the concept of refuge and the concept of refugees; the pursuit of national objectives challenges traditional assumptions (such as the right to seek asylum) and can interfere with the international community's search for solutions.

Nationality and the nation-state stand at either end of the protection-solution equation. The individual without a nationality, who in law or in fact is 'unprotected', is still an anomaly, and resolution of that situation must often remain an imperfect reflection of a particular ideal – re-establishment in a community. General international law prescribes human rights for all, but in the present system of world organization, States are the principal guardians of this ideal, and States represent the communities in which rights must be realized. Refugees are those without a community, other than their own, which is circumscribed by flight and loss.

At every moment the refugee community stands in competition with every other community; its claims for protection have a universal basis, though they are not absolute. The public or political interest of other communities is not just an interest to be overridden, and competing claims must be resolved. Refugees, no matter how numerous, are nevertheless a community of individuals, each of whom makes a particular claim for protection upon another community and its institutions. Issues are involved similar to those apparent in human rights discourse, which distinguishes collectivist and individual models. Competing claims must be resolved finally by negotiation and compromise which best preserve fundamental values. Refugee law, at one level, is but a relatively small part of the system of

international law, and refugee rights, after all, are little more than sub-categories of basic human rights.

The realm of the dispossessed, however, exceeds even the broadest working conception of the refugee; it includes those who do not flee and those who may be expelled *en masse*, yet still 'enjoy' the protection of their country of nationality (Goodwin-Gill 1984). It includes those who, like certain categories of stateless persons, may be without protection and yet not be refugees. In past years, UNHCR operated assistance programs for the internally displaced in a number of countries, particular those divided by civil conflict, separatist and unification struggles. Such a role could be extended in the future, by analogy to other situations, but the place for protection activities must remain uncertain; it may be conceptually inappropriate in operations that have no refugee or returnee component, but much will turn on detail and the terms of UNHCR's involvement. There is no necessary division between the humanitarian role of meeting humanitarian needs and a legal interest in security and welfare.[32]

Definitions always limit the scope for action. Failure to take account of and apply definitional niceties, that is, taking responsibility widely and generously, constrains the future choice of options; only certain solutions are available for refugees of concern to the international community. A rigid approach to the issue of competence, on the other hand, would place unknown numbers beyond the pale of protection, which is evidently not what States want. UNHCR is thus trapped in paradox, between the formal limits of its competence and the realities of humanitarian necessity.

(3) Substantive limits

The protection system aims, from a humanitarian and legal basis, to provide for refugees, considered as persons in distress, who have been compelled to flee their own land. Refugee law, on the other hand, developed alongside immigration control and the rise, or entrenchment, of the nation-state. Coerced and other uncontrolled population movements challenge that aspect of sovereignty subsumed within the principle of community and self-determination. Refugee law – the identification and selection of a limited class of persons in need who are to be considered worthy of protection and assistance – meets halfway or less the challenge of the inevitable. It can be conceived as minimizing, as far as possible, the perceived negative consequences of that challenge, passing over, for example, those who may remain in greater need in distant countries. In the complex political society of independent nation-states, refugee law can thus be seen as standing in opposition to refugees themselves. In this sense, it

seeks to maintain a balance favouring the demands of nation-state, territory, jurisdiction, control and self-determination.

The moral obligation of mutual aid in situations of grave and urgent necessity, of distress, is sometimes said to apply only to individuals, to fall outside the category of duties that may bind a State, community or other corporate personality. To this moral objection to protection may be added obstacles of legal weight: the sovereign rights of a State in respect to its own nationals within its own territory; and the similar prerogatives of any State in regard to those seeking or enjoying refuge on its territory. The moral objection can be met with arguments deriving from both the existence of communities as communities of individuals and the representative nature of government and its institutions. The legal obstacles must be overcome through reliance upon such rules and principles as have their basis in general international law.

Protection and solutions depend upon the joint endeavours of UNHCR and States. UNHCR has been entrusted with certain responsibilities that depend in turn for their fulfillment upon actions and measures taken by States within their territory and jurisdiction; and inescapable tension necessarily links the international institutional role to national interests. In this middle ground, the role of law and obligation is often imprecise.

In 1951 Convention and the 1967 Protocol foresee a particular type of formal relationship; the relationship becomes less direct and more subtle when those whom UNHCR is charged to protect do not come within the scope of international instruments or fall outside the territorial area of application, either of those provisions or of regional custom. The divergence between UNHCR's institutional responsibilities and comparable systems of State obligation requires resolution in light of the fundamental objectives of protection and solutions. States' territorial responsibilities involve refuge and standards of treatment, individual liberty and community interests; the international community's responsibilities include not only UNHCR's protection and assistance roles, but also attention to root causes.[33]

The limits to the existing protection are not only those on the outside, circumscribing categories and functions. They are also internal, in an incomplete model that allows the norms governing one principal actor in the field to diverge from those that constrain its essential partners. Protection and solutions are not, and perhaps could not be, perfectly linked in a normative chain. A society of sovereign but interdependent States might well be expected to confer responsibilities on its agencies, but not necessarily to create a parallel system of obligation. The result is a gap between institutional roles and legal obligations, between refugee and refuge, between

non-refoulement and asylum, between protection and solutions, and often, finally, between the individual and the ideal of fundamental human rights regardless of nationality or status.

(4) Beyond the limits

The existing system of international protection is far from perfect. It was established with limited purposes and limited objectives but has nevertheless evolved, *ad hoc*, in the face of recurrent situations of necessity. State and international organization practice has assisted in this process and helped to develop and universalize certain basic principles, but there is ample room to improve co-ordination among responsible agencies.

The Group of Governmental Experts reporting in 1986 urged "the main organs" of the United Nations to make fuller use of their respective competences, "with a view to considering at the earliest possible stage situations and problems" that could give rise to massive flows of refugees. It further recommended that the Secretary-General be encouraged "to make full use of his competences", in accordance with the Charter and the relevant mandates of UN organs. In particular, the Secretary-General was requested to give continuing attention to the question of averting new massive flows; to ensure that timely and fuller information is available, analyzed and assessed with the Secretariat; to share the information; and to strive for timely and more effective action by UN agencies and Member States. The report also recommends that "the relevant economic assistance agencies and other bodies of the United Nations" consider giving greater support to projects that could help prevent new massive flows.[34]

In December 1986, the General Assembly adopted these conclusions and recommendations, and certain steps towards implementation have already been taken within the UN Secretariat. UNHCR obviously stands to benefit from any such system of information gathering and analysis, particularly in regard to possible causes of future flows. In the past, the Office has been somewhat hesitant about the issues of causes and prevention, even where policies and programs (for example, on assistance and resettlement) may themselves be causative elements – pull factors – in refugee movements. UNHCR's mandate requires that its work shall be 'non-political', but that qualification demands impartiality, rather than non-involvement, and even-handedness in the provision of protection, rather than disregard of causes in the search for solutions.

In November 1986, Denmark submitted a draft resolution in the UN Third Committee on international procedures for the protection of refugees.[35] This proposed a general priority in solutions of voluntary repatriation, regional integration, and resettlement outside the

region, which might nevertheless vary in the light of circumstances. The draft went on to acknowledge the need to compensate first asylum countries facing large refugee flows "through international assistance programmes, including the financing of the establishment and administration of regional United Nations processing centres." The purpose of such centres would be to manage a global resettlement scheme based on annual quotas to be offered by Member States. It was suggested that the Secretary-General, in co-operation with UNHCR, should report on the numbers of refugees that each Member State appeared able to receive, given population, population density and gross national product (Grahl-Madsen 1980, 102-114).

In a statement to the Third Committee, Denmark described additional elements, which would include UNHCR as the focal point for processing asylum-seekers in the regional centres and determining their status as refugees. Asylum-seekers who travelled "irregularly" outside the region would be returnable in principle to the centre in their region of origin where, if determined to be refugees, they would be eligible for assistance under programs for voluntary repatriation, regional integration and resettlement.[36] The proposal confidently anticipated that enough resettlement places would be secured, but major issues of principle were left unaddressed.

In a later statement, in which Denmark agreed not to press for a decision on its proposal, it was added that UNHCR's role in assessing the need for refugee status "should only be regarded as a *recommendation* to governments and never, of course, as a substitute for the national authorities' competence.[37] Whatever the overall merits of the scheme, to allow for divergence on the issue of refugee status would clearly entail a further widening of the disjuncture between UNHCR's institutional responsibilities and the legal obligations of States in the context of protection and solutions. In concrete terms, unless means are found (for example, a joint UNHCR-States determination process) to ensure both consistency and acceptance of decisions, residual caseloads of internationally recognized refugees will be created in the territories of first asylum countries. Their entitlement to protection, assistance and solutions would be in jeopardy for it is evident also that first asylum practices will often be conditioned by expectations as to the viability and integrity of the international system.

Nevertheless, any measure that will promote consensus or broader agreement on questions of refugee status is likely to enhance protection and assist the search for solutions. In the resettlement context, for example, it may help to remedy the politics and the prejudice sometimes inherent in selection programs, which raise factors such as ethnic origin, capacity for assimilation, history or

advantage above refugee status and the human dimension of necessity.

In principle, there is no reason why the policies and principles of protection should not be designed with a view both to solutions in the broad sense and to prevention, providing that fundamental principles are maintained. These would include, in effect, recognition of the right to seek asylum and of the existence of a category of persons to whom protection is due and for whom the international community should find solutions. At the same time, aid and development assistance can clearly influence what happens in both refugee-producing and refugee-receiving countries.

Substantive lacunae also remain to be filled in the legal context. Institutional responsibilities in situations of mass expulsion need to be defined, and the relevant rules of international law must be clarified. Major issues of State responsibility require elucidation, both in relation to countries that are the origin of coerced population movements, and on possible implications, for example, in the matter of individual or inter-State compensation (Lee 1986b). Certain groups, too, tend to fall between the provisions of existing systems. Thus, the situation of Palestinians remains in some dispute, both once they have left the area of operations of UNRWA and given the particular limitations of UNRWA's own mandate. The fate of those generally who are determined not to fall within the existing system must also be addressed. In theory, some may be returnable to their respective countries of origin, but for others this option may be constrained by the obligation to ensure that basic standards of safety and dignity are met, or by the fact of their statelessness.

Crucial to any system of protection are accurate sources of information. UNHCR, for example, needs systematic access to reports on conditions in any country that may bear on refugee flows; these include situations of war or inter-communal conflict of an ethnic, religious or political nature, widespread violations of human rights, and even ecological and natural disasters.[38] Such information will allow the formulation of policies for flows and more systematic determination of the well-foundedness of claims to protection. Mass flows, however, are made up of smaller groups of individuals. Information from the refugees themselves will also be needed if UNHCR is to know who requires special measures of protection. Any refugee movement can comprise incompatible elements; ethnic, religious and political factors can be a source of tension and danger for refugees in their mutual relations and in contacts with the host community. Women and children can be exposed to exploitation, and the lives of dissident or politically prominent refugees can be endangered. Effective protection will be achieved only where UNHCR

identifies those who are vulnerable and acts in response to their needs.

Finally, there may be some scope for elaborating a global approach to 'persons in distress', as an appropriate rationalization of definitional problems (Goodwin-Gill 1986, 916-18). Such an approach may need to recognize the unsuitability of certain types of international legal obligation, in favour of a system based on more flexible and practical standards of international co-operation and premised on a view of the protection system as something more than a reactive, band-aid operation.[39] That time has not yet come, however, and what is still needed is an increasingly active use of the resources of the existing system in the protection of the fundamental rights of the persecuted and the displaced.

Notes

1. UNGA res. 428(v), 14 December 1950; text in Goodwin-Gill, *The Refugee in International Law*, (1983), Annex III.

2. See UNGA resolutions 1499(XV), 1673(XVI), 1959(XVIII), 2294(XXII), 3143(XXVIII), 34/60. See also UNHCR Executive Committee *Report* 1981, para. 57(2); *Report* 1982, para. 43(f).

3. See *UNHCR Activities Financed by Voluntary Funds*: UN doc. A/AC.96/693 (Part I - Africa), paras. 1.7.1-21 (increase of Sudanese into Ethiopia, repatriation from Djibouti, Somalia and Sudan); paras. 1.12.1-23 (re-enumeration in Somalia likely to see decrease in numbers); paras. 1.13.1-2 (new arrivals in Sudan offset by returns). Exceptions were the influx by 30 June 1987 of some 227,000 Mozambicans into Malawi (ibid., para. 1.10.1) and the Angolans and Mozambicans into Zambia (ibid., para. 1.18.1). See also Un doc. A/AC.96/693 (Part II - Asia and Oceania), noting decreasing numbers of Indochinese refugees and displaced persons. In Central America, there were increased arrivals of Nicaraguans in Costa Rica and Honduras; some returned relatively quickly, and many others expressed an interest in so doing: UN doc. A/AC.96/693 (Part IV - Latin America and the Caribbean), paras. 4.2.1 and 4.3.1. Numbers also remained stable in South West Asia, the Middle East and North Africa, apart from increases in Pakistan and Iran: UN doc. A/AC.96/693 (Part V), paras. 5.4.1. and 5.6.1. Europe and North America, however, generally reported increases in the numbers of arrivals, especially in Turkey (Iranians), but also throughout the

region: UN doc. A/AC.96/693 (Part III), paras. 3.9.1, 3.12.1, 3.12.3, 3.13.1.

4. The term 'asylum-seeker' is intended as a neutral description, which will include both those who may in due course be recognized as refugees in the sense of the Convention/Protocol, or found to merit refuge and protection on broader, humanitarian grounds, as well as others whose claims on either count are not well-founded. Among the latter will be some abusive and manifestly ill-founded applications; in principle, therefore, it might be inappropriate or, indeed, incorrect to characterize such cases as involving 'asylum-seekers'. The problem, as States have found, is to separate the wheat from the chaff, at the same time ensuring observance of the fundamental principle of *non-refoulement*.

5. For background see, *inter alia*, UNGA res. 319(IV), 3 December 1949, Annex, para. 4: "The High Commissioner, in order to promote, stimulate and facilitate the execution of the most suitable solution to the problem with which he is entrusted, should provide for the protection of refugees and displaced persons falling under the competence of the Office . . .". ECOSOC res. 319(XI), Annex, Ch. III, B, C, used similar wording but without the reference to 'displaced persons'. Competence, however, was defined to cover (draft) Convention refugees, "and such other persons as the General Assembly may from time to time determine"; see ECOSOC res. 319(XI)A. On 'facilitation' and 'promotion', see also General Assembly debate in 1957 on resolution 1166(XII): 12 GAOR, Third Committee, pp. 232-5, 238. During debate in 1950, one representative said that international protection was necessary because refugees suffered various legal disabilities in countries of asylum; it "would be the duty of the High Commissioner to intervene with governments on their behalf in order that they might be afforded minimum rights and privileges essential to their existence and security": 5 GAOR, Third Committee, p. 363 (1950), Mrs. Roosevelt (USA). Another representative suggested that the High Commissioner "would have to exercise as it were both diplomatic and consular functions, functions of an administrative and legal character which would go beyond the scope of the Convention": *ibid.*, p. 365 (Mr. Perez Perozo, Venezuela).

6. UNGA res. 319(IV), 3 December 1949, Preamble; ECOSOC res. 248(XI)A, 6 August 1949.

7. UNGA res. 428(V), 14 December 1950, para. 2. The necessity for co-operation with UNHCR and between States has since been acknowledged in successive General Assembly resolutions and in a variety of international instruments, including the preamble to the 1951 Convention Relating to the Status of Refugees, the 1967 UN Declaration on Territorial Asylum, the Final Act of the 1968 Teheran International Conference on Human Rights, the preamble to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Resolution 14 (1967) of the Council of Europe on Asylum to Persons in Danger of Persecution, and the 1984 Cartagena Declaration.

8. See, for example, UNGA resolutions 1500(XV), 5 December 1960 and 1672(XVI), 18 December 1961, referring to the joint UNHCR/League of Red Cross Societies Operation for refugees from Algeria in Morocco and Tunisia; similarly, UNGA res. 1671(XVI), 18 December 1961 (Angolan refugees in the Congo).

9. *Report* of UNHCR to ECOSOC (UN doc. E/1986/55), paras. 158-164; see also UNHCR Executive Committee *Report* 1986, paras. 114-116; *Report* of UNHCR to ECOSOC (UN doc. E/1987/56), paras. 139-142.

10. The level of NGOs' concern is immediately evident from their contributions to Executive Committee debates; see, for example, UN doc. A/AC.96/SR.392 (1985), paras. 43-48, in which the Observer for the International Council of Voluntary Agencies (ICVA) called attention to the need for open discussion of the "irregular movements" issue, criticized restrictive and deterrent measures, and cautioned against allowing "promotion" of voluntary repatriation to shade into coercion, particularly where the original causes for flight remained unchanged. In 1986, the ICVA Observer raised problems of protection of refugees in Central America, expressed concern about the voluntariness of repatriation from Djibouti, and called for greater involvement of UNHCR in protection work in North America; see UN doc. A/AC.96/SR.405, paras. 24-31; also SR.406, paras. 82-89, SR.410, para. 19. The Observer for the Independent Commission on International Humanitarian Issues cited detention and procedural problems and suggested a role for NGOs in the protection of returning refugees (UN doc. A/AC.96/SR.406, paras. 77-81). Executive Committee conclusions on protection ignore almost entirely the extent of UNHCR's (and refugee's) reliance on NGOs. Typical among the infrequent references are Conclusion No. 9 (1977) on family reunion (UNHCR to play a

co-ordinating role, intervening with governments, intergovernmental organizations and NGOs); Conclusion No. 29 (1983) on general issues (noting the importance of developing standards of protection by maintaining a constant dialogue with governments, NGOs and academic institutions); and Conclusion No. 43 (1986) on detention (recommending that detained refugees and asylum-seekers have the opportunity to contact UNHCR "or, in the absence of such office, available national refugee assistance agencies" (UN doc. A/AC.96/688, para. 128(g)).

11. Amnesty International, the Anti-Slavery Society, the Minority Rights Group and the International Commission of Jurists are typical of such active and informative NGOs. The international role of NGOs in the broad human rights field has been confirmed and developed, *inter alia*, through the mechanism of consultative status with ECOSOC (under article 71 of the UN Charter), and thereby also with bodies such as the Commission on Human Rights. Cf. UNGA res. 36/121, 10 December 1981. para. 3, requesting NGOs to ensure that the rights and interests of Namibia are protected. On the desirability of NGO involvement in a related context, see Alston 1987, 367-74.

12. Executive Committee conclusions on protection ignore almost entirely the extent of UNHCR's (and refugee's) reliance on NGOs. Typical among the infrequent references are in UNHCR *Report* 1977 on family reunion (UNHCR to play a co-ordinating role, intervening with governments, intergovernmental organizations and NGOs); UNHCR *Report* 1978 on general issues (noting the importance of developing standards of protection by maintaining a constant dialogue with governments, NGOs and academic institutions); and UNHCR *Report* 1986 on detention (recommending that detained refugees and asylum-seekers have the opportunity to contact UNHCR "or, in the absence of such office, available national refugee assistance agencies".

13. Cf. the protection function of the International Committee of the Red Cross under the system consolidated by the 1949 Geneva Conventions and the 1977 Protocols and, in particular, its right of initiative, the freedom to engage in "toute initiative humanitaire . . . toute action que les conventions n'auraient pas prévue mais qui serait nécessaire pour la protection des victimes" (Veuthey 1983, 332-3).

14. *Barcelona Traction* case, I.C.J. *Reports* 1970, 3 at 32; see also *United States Diplomatic and Consular Staff in Tehran*, I.C.J. *Reports* 1980, 3 at 42: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." Note also the general principle recognized by international humanitarian law, that those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity.

15. See article 2(1), 1967 UN Declaration on Territorial Asylum: "The situation of persons [entitled to invoke article 14 of the Universal Declaration of Human Rights . . .] is, without prejudice to the sovereignty of States and the purposes and principles of the United Nations, of concern to the international community."

16. This has included promoting equality of status: UNGA res. 2198(XXI), 16 December 1966 (Protocol relating to the Status of Refugees); and maintaining the principles and spirit of the 1967 Declaration on Territorial Asylum and the 1948 Universal Declaration of Human Rights: UNGA res. 2399(XXIII), 6 December 1968, para. 2(b). On protection as a principal function of UNHCR, see UNGA res. 3272(XXIX), 10 December 1974; also subsequent resolutions on the basic human rights of refugees: 3454 (XXX), 9 December 1975; 31/35, 30 November 1976; 32/67, 8 December 1977; 33/26, 29 November 1978. Later resolutions have focused on particular problem areas; see, for example, UNGA resolutions 34/60, 29 November 1979; 35/41, 25 November 1980; 35/135, 11 December 1980 (refugee and displaced women); 35/187, 15 December 1980 (refugee and displaced children); 36/125, 14 December 1981 (protection in situations of large-scale influx, protection against armed attacks). See also UNGA resolutions 37/195, 18 December 1982; 38/121, 16 December 1983; 39/40, 14 December 1984; 40/118, 13 December 1985; 41/124, 4 December 1986.

17. Cf. ECOSOC res. 248(IX)A, 6 August 1949, referring to a considerable number of refugees, many of whom will not be capable of being rapidly absorbed into the national communities of the countries where they were living. ECOSOC res. 319(XI)A, 11 August 1950, Annex (see above, note 5). Note also that the rationale for loss of refugee status as a result of voluntary acts of

the individual is the existence of a solution ('protection' has been found again).

18. UNGA res. 430(V), 14 December 1950; UNGA res. 538(VI), 2 February 1952. States were invited to include, and UNHCR was asked to promote, refugee needs in economic reconstruction and development programs; immigration countries were asked to offer opportunities to refugees. See also ECOSOC res. 589(XX), 29 July 1955 (need for resettlement to relieve countries of first asylum and to promote economic integration).

19. UNGA resolutions 727(VII), 23, October 1953; 728(VIII), 23 October 1953. Cf. UNGA res. 832(IX), 21 October 1954 on international assistance to refugees.

20. UNGA resolutions 925(X), 25 October 1955, Preamble and para. 1; 1039(XI), 23 January 1957, para. 3.

21. UNGA res. 37/195, 18 December 1982, para. 4. See also UNGA res. 39/140, 14 December 1984, Preamble and para. 6, linking the importance of assistance and resettlement opportunities for refugees "for whom no other durable solution may be in sight, notably in countries of first refuge", with continuing admissions on a permanent or temporary basis of large numbers of refugees and displaced persons of concern to UNHCR. The same resolution noted with satisfaction UNHCR initiatives in regard to development-oriented assistance to refugees and returnees: ibid., para. 7; see also UNGA resolutions 40/118, 13 December 1985, para. 8; UN docs A/C.3/41/L.56, A/41/880, pp. 10-14, para 12 (1986).

22. See, for example, article 13, 1950, European Convention on Human Rights; article 25, 1969 American Convention on Human Rights; article 2(3), 1966 Covenant on Civil and Political Rights.

23. Similar considerations apply, at one remove or more, to other categories, such as children or the disabled, for whom the exercise of protection (without prospect of solution) may otherwise be quite meaningless. Articles 31 and 32 of the 1951 Convention also recognize that resettlement (admission to another country) is implicit in the concept of protection.

24. See article 12, 1958 Geneva Convention on the High Seas; views of the International Law Commission [UN doc. A/3179(1956)]

article 98, 1982 United Nations Convention on the Law of the Sea; Goodwin-Gill 1983, 87-92.

25. UNHCR's *Guidelines for the Disembarkation of Refugees* (1983) and later development of the Rescue at Sea Resettlement Offers Scheme (RASRO), scheme refined and rationalized related aspects of the basic problem (rescue-disembarkation-solution). In particular, UNHCR developed a scheme for reimbursement of expenses, while States within the RASRO scheme collaborated to share the rescue caseload more evenly.

26. The refugee character may stem from reliance on objective criteria, such as those mentioned in article I.2 of the 1969 OAU Convention; or from the process of *prima facie* determination, in which for a combination of technical and practical reasons, all members of a group are assumed to have a well-founded fear of persecution.

27. See paras. 1 and 8(c), UNHCR Statute; UNGA res. 428(V), para. 2(d); article 9, 13(2), 1948 Universal Declaration of Human Rights; article 5, 1965 Convention on the Elimination of All Forms of Racial Discrimination; article 12, 1966 Covenant on Civil and Political Rights.

28. See, for example, UNGA res. 1167(XII), 26 November 1957 (Chinese refugees in Hong Kong).

29. See, for example, UNGA res. 2958(XXVII), 12 December 1972 (Assistance to Sudanese refugees returning from abroad). See below, text preceding note 32.

30. See UN doc. A/AC.96/508, p. 5 (1974); *Report* to the General Assembly, 29 G.A.O.R., Supp. 12A, p. 28: UN doc. A/9612/Add.1 (1974). The situation involved foreign refugees in Chile after the 1973 coup. See also UNHCR, *Handbook for Emergencies*, Pt. II (1983), paras. 13.2, 13.3.8.

31. Cf. the situation of Mozambicans in South Africa in 1987, who have been almost entirely dependent upon local voluntary agencies.

32. See articles 2 and 11, 1966 Covenant on Economic, Social and Cultural Rights; note also the stress laid by article 11 on international co-operation. See generally Alston and Tomasevski 1984.

33. UNGA res. 41/70, 11 December 1986; Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees: UN doc. A/41/324, 13 May 1986; Lee 1986b.

34. UN doc. A/41/434, paras. 68, 70-72.

35. UN doc. A/C.3/41/L.51, 12 November 1986.

36. Statement on 7 November 1986 by Denmark in the Third Committee of the UN General Assembly, 41st Session, on Agenda item 99: Report of the UNHCR.

37. Statement of 14 November 1986 by Denmark in the Third Committee on draft resolution L.51 (emphasis in original). Denmark also noted that there was no consensus as yet on a comprehensive approach.

38. Although UNHCR is not responsible for those fleeing natural disasters, such factors are often a contributory element in refugee movements. UNHCR will also need to share information from its own sources with such early-warning or kindred mechanisms as may be established pursuant to UNGA res. 41/70, 11 December 1986.

39. See generally Sadruddin Aga Khan, *Study on Human Rights and Mass Exoduses* [UN doc. E/CN.4/1503 (1981)].

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*International Refugee Law: Humanitarian Standard or Protectionist Ploy?**

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This paper presents a critical analysis of the functions and the limits of the existing refugee protection system. In considering this issue, the background paper by Dr. Guy Goodwin-Gill (reproduced elsewhere in this volume) is useful. The disjuncture he draws between the institutional component of refugee protection and the system of refugee law is important in understanding how the system works and what its functions and its limits are. On the institutional front, the UNHCR, the Red Cross and other organizations are moving in a comprehensive, expansive direction, broadening protection in a way that one might see as consistent with humanitarian values. In institutional terms, some progress is being made in the attainment of human rights or humane objectives.

The system of refugee law, on the other hand, seems to be moving in exactly the opposite direction; that is, states are taking an increasingly narrow, restrictionist approach to the interpretation of their own legal obligations to protect refugees. Such a background makes it necessary to consider how the international community can purport to increase the humanitarian competence of international

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institutions while simultaneously doing its utmost to slam national doors in the faces of needy asylum-seekers through visa controls, access tests and a technocratic approach to the interpretation of the refugee definition. How can these two apparently contradictory approaches be reconciled?

My basic proposition is that there is no incongruity between, on the one hand, the attribution of an expansive humanitarian mandate to the UNHCR and, on the other, the clear intention of most Western states to circumscribe their obligations to protect refugees. Indeed, the two approaches are quite consistent. Such a view is premised, however, on a rejection of the humanitarian or the human rights rationale for refugee law that is suggested in Goodwin-Gill's paper and, indeed, in virtually all the scholarly literature. Rather, I argue that refugee law does not derive from a commitment to either humanitarianism or human rights and has been, particularly since 1950, intimately linked to the attainment by powerful states of their own national goals.

This paper seeks to demonstrate this assertion by analyzing the evolution of the conceptual scope of refugee law. First, it will be argued that the notion that humanitarianism was a matter of concern in refugee law even in 1950 is unfounded. Second, the continuing importance of the refugee law system for the attainment of Western national interest will be demonstrated. Finally, these arguments will be linked back to the dualistic approach to refugee protection outlined by Goodwin-Gill in his paper.

The first point is illustrated by the drafting history of the 1951 United Nations Convention Relating to the Status of Refugees, which illuminates the underlying rationale and function of the system. In the initial years of refugee law, from the 1920s to the 1930s, when the system was created essentially by European states for European refugees, there was a reasonable amount of humanitarianism within the system. By 1950, however, it can be argued that the trend was very firmly against humanitarianism. From the debates surrounding the drafting of the Statute of the High Commissioner and the Convention itself, it is apparent that states were very busy trying to limit the proposed scope of refugee protection in ways that suited their particularized national interests.

The Soviet Union and its allies, for example, argued that the notion of comprehensive protection was based on a false premise. Only stateless persons, the Soviet Union argued, should be protected by the international community, not persons who had ideological or social reasons for fleeing their country. So strong was the Eastern Bloc's rejection of the validity of ideological or social incompatibility as a rationale for international movement that the Soviet alliance

declined to participate in the work of the committees that drafted the 1951 Convention.

This left a vacuum that the Western states were not slow to fill from the perspective of their particular ideological partisanship. Notwithstanding the humanitarian pleas of several middle powers, particularly the United Kingdom, to protect all unprotected persons within the international mandate, the ultimate decision was to protect only refugees, defined as persons in fear of persecution, and to exclude the stateless persons for whom the Soviet Union had advocated. France and the United States were particularly adamant in this view. They argued that the needs of refugees were more serious than those of stateless persons. Yet they failed throughout the entire debate, despite constant prodding from the British, to justify from a humanitarian perspective why the needs of refugees were greater than those of stateless persons.

Nor was there a commitment to the grounding of refugee law in the promotion of international human rights. French efforts to link refugee status to violations of fundamental human rights and to the general human right to seek asylum were summarily rejected as theoretical and too far removed from reality.

This rejection of comprehensive humanitarian or human rights coverage can be explained by the conviction held by most Western states that their re-settlement capacities should be saved for those whose flight was motived by pro-Western political values. As anxious as the Soviets had been to make sure that international protection was not used to benefit their ideological opponents through the grant of asylum, so too were the Western states anxious to make visible the flight of the ideological opponents of those same Eastern Bloc regimes. Thus, the debate focused primarily on how best to facilitate the immigration of Soviet Bloc dissidents in a way that would not, at least apparently, be inconsistent with the universal mandate of the United Nations.

This apparently neutral formulation of a refugee definition, based on a well-founded fear of persecution, facilitated the condemnation of Soviet-bloc politics through international law in two ways. First, the persecution standard was a well-known quantity, having already been used by the International Refugee Organization to embrace Eastern Bloc dissidents in the immediate post-war years. It was understood that the concept of fear of persecution was sufficiently open-ended to allow the West to continue to afford ideological dissidents international protection. Moreover, the new Convention transferred the refugee determination authority to individual states, rather than to an international organization, thereby enhancing the flexibility to make ideologically-based refugee determinations.

Second, and perhaps more fundamental, the formulation of the persecution standard meant that although it could be used by the West to embarrass the East Bloc, the reverse could not occur. The refugee definition was carefully phrased to refer only to a fear of persecution on the grounds of race, religion, nationality, membership of a social group, or political opinion. It is probably true that the Western record in avoiding civil and political discrimination was generally better than that of the Soviet Bloc, but the capitalist states were arguably more vulnerable on the issue of respect for socio-economic human rights. Persecution on socio-economic grounds, however, was not included in the ambit of the international refugee definition, thus continuing the lopsided and politically biased human rights rationale for refugee law found in the immediate post-war years.

In sum, the definition selected in 1950 for the Convention on the status of refugees established an international regime that was supportive of Western political and ideological goals. It was not designed to provide even-handed humanitarian assistance, or even to meet the needs of all victims of human rights abuse. The opting-out of the Soviet Union and its allies from the design of the Convention allowed Western nations to take hold of the process and to construct a refugee protection system that responded to their desire to discredit the legitimacy of the socialist bloc.

With the end of the Cold War, one would assume that such a rationale would no longer be sufficient. Indeed, there has been a shift in the underlying rationale for refugee law, but it serves the interests of Western states no less now than it did in 1950. Now the politics of Western states are concerned less with promoting immigration from the Soviet Bloc than with stemming the arrival of Third World migrants. In this task, too, the politically-defined narrowness of the fear of persecution standard has allowed Western countries to make refugee determinations in a manner consistent with their own priorities.

It will be recalled that part of the initial attraction of Western states to the persecution-based definition was the ability to ascribe repressive behaviour to their ideological adversaries via each grant of refugee status. Because virtually all refugees originated in the East Bloc and because all Western states were politically opposed to the regimes of those states, refugee claimants effectively benefited from a readiness in the West to assume the likelihood of persecution in the state of origin. However, as more refugee claimants have made their way to the West from repressive developing countries to which Western states are politically or economically tied, that presumption has been reversed. It is unfortunately but predictably common for governments to recognize the existence of persecution only in cases

where their own policies or political or economic interests are not prejudiced by that recognition. In consequence, the persecution-based standard now serves as a major shield for Western nations, because its political subjectivity permits the rejection of refugee claims from countries to which Western states are allied, humanitarian or human rights concerns notwithstanding.

Because the definition links refugee status to neither humanitarian need nor respect for human rights, but rather to an individuated examination of fear in relation to objective conditions, the position may, and has, been taken by Western states that only truly exceptional claimants ought to benefit from international protection. As Western countries have become increasingly disinclined to admit refugees, the definition has served as a convenient basis on which to justify or attempt to legitimate restrictionist behaviour. The assertion, familiar to those in the advocacy community, that the applicant must show that she or he has been singled out or targeted for persecution, serves to disenfranchise the majority of the world's refugees whose search for protection is motivated by factors that affect groups of persons with largely equivalent force. So compelling is this implied limitation that states committed to the broadening of the refugee concept have by and large felt obliged to create auxiliary regional and national norms that explicitly by-pass the international standard.

For most industrialized states, however, the restrictionist signal is a convenient basis upon which to deny refugee claims that are perceived to be inconsistent with the states' own self-interest. If one takes this view of refugee law, the duality of approach described by Goodwin-Gill is explicable. It makes sense to be generous at an institutional level, because this cuts down the attraction to emigrate to the West; to provide material aid, promote voluntary repatriation and even provide developmental assistance, because this kind of apparently humanitarian intervention will effectively serve as a means of localizing and containing refugee flows. On the other hand, protectionist goals are currently best served by restrictionism in the application of refugee law; as a result, Western states have adopted a narrow technocratic approach to the admission of refugees. This combination of non-legal efforts to encourage refugees to stay at, or near, their place of origin and a narrowly defined legal obligation to admit such refugees as are compelled to migrate has served to reduce the risk of uncontrolled movements of persons to states of destination.

This analysis leads to some degree of concern with Goodwin-Gill's prescription that the most effective means of attaining humanitarian or human rights goals is the increasingly active use of the resources of the existing system. The existing system is simply wedded too closely to the attainment of political goals of powerful

states to be counted upon to advance either a humanitarian or a human rights agenda. However, it must be admitted that there is a risk that an attempt to fundamentally restructure refugee law at this time may lead to a reduction, rather than to an enhancement of humanitarianism in refugee law. At the very least, though, this paper suggests that one should approach that process of activism within the system with a great deal of cautious scepticism and with the knowledge that humanitarian efforts are not consistent with the goals of the architects of the protection system, nor are they likely to be appreciated or supported by them.

To conclude, this paper's argument is not that there can never be humanitarian or human rights results from the application of refugee law. Clearly there have been and, one hopes, will continue to be at least some in the future. Rather, the paper argues that one has to understand clearly that the primary function of the legal component of the protection system was and is the promotion of the national interest of states, not refugees. The primary limitation of the protection system, therefore, is that the kind of active creativity that may be undertaken successfully within the context of the present refugee law system must, of necessity, involve the rationalization of human rights or humanitarian objectives as part of the strategically-defined agenda of powerful states.

Discussion

The discussion held at the completion of this session sought first to analyze the thesis put forward by James Hathaway and, second, to examine the place of the 1951 Convention within the existing protection system.

Professor Hathaway had argued, as one commentator succinctly noted, that refugee law had been developed to protect national interests, not to defend humanitarian principles. In other words, that humanitarianism and national interests are two very different issues.

However, several speakers suggested modifications in the argument. Thus, it was noted that the pursuit of national interests may not always exclude upholding humanitarian concepts at the same time. Indeed, it may well be politic to do so, although, as Professor Hathaway noted in response, most powerful states have not perceived humanitarianism as consistent with national interest. Others observed that the retreat of multilateralism has to be considered. This has meant that North-South tensions have overtaken East-West rivalries in most parts of the world, and refugee law and practice have been unable to adjust to this change. Thus, situations in Africa and Asia have become difficult to resolve according to the usual East-West pattern of rivalries because new tensions, a North-South dichotomy, have been introduced.

One commentator observed that because the phenomenon of statelessness is very different from that of refugeehood, the Convention could not have dealt with both. Therefore, the failure of the drafters in this regard was not due solely to political confrontation but to the fact that the substance of the matter proved too difficult to resolve in one convention. It was also pointed out that authoritarianism should not be overlooked as an underlying cause of today's refugee problems. Indeed, it was important to recognize the contradiction that most of the world's 120 to 160 authoritarian states are supported by the powerful democracies of the world. Finally, several discussants argued that humanitarianism need not be seen solely as a philosophical discourse but as practical policy, a point well illustrated by many people's movements and NGOs.

Discussion also sought to elaborate the contention that Canadian refugee policy operated unfairly. Thus, one speaker noted that Canada has posts in London, Glasgow and Liverpool to handle immigration requests from Britain but there are not more than three Canadian embassies in Latin America and four in the whole of Africa that are equipped for immigration processing. If such unfairness exists in the immigration process, it was argued, how can equity and fairness be expected in Canada's refugee system? Moreover, it was noted that Canada, at the time when Solidarity was experiencing repression, actively encouraged Poles onboard ships in Vancouver to seek refuge in Canada, yet the arrival of two boatloads of Tamil and Sikh refugee claimants prompted legislation to prevent abuse. How could such people abuse the system, it was asked, when there is no fairness and equity in the refugee system for three-quarters of the world's people?

Amplifying this argument, it was noted that the Canadian government has traditionally taken the position that the lack of fairness present in the Convention definition will be compensated by Canadian efforts in resettlement from overseas, which go beyond the scope of the Convention definition. However, the pattern of Canadian refugee sponsorship is exactly the same as that seen in the distribution of posts handling immigration requests. Thus, of the 13,000 to 14,000 refugees to be sponsored in 1987, the allocation for Africa is only 1,000, and only 500 to 600 are actually resettled in any given year. On the other hand, there are 4,000 sponsored places for Eastern Europeans in the current year, individuals who need not even meet the Convention definition but merely be outside their country of origin and not willing to return. Such observations caused one speaker to speculate that if there was no fairness within the system then perhaps the question of humanitarian values and human rights is of secondary concern when considering the protection of refugees.

On the topic of the 1951 Convention, a number of important points were made during the discussion. Thus, it was noted that the original drafters of the Convention keenly wanted to limit the scope of the Convention to events occurring in Europe. They were very wary about what they saw as signing a blank cheque in favour of refugees in Asia and elsewhere. Indeed, they believed that such regional problems should be the subject of additional regional instruments that should be discussed in due course.

It was also noted that the drafters of the 1951 Convention did not anticipate that the Convention would become a symbol by reason of its core content, *non-refoulement* and definition. It has come to represent the essence of protection as it is now understood, as an active endeavour on behalf of unknown numbers of people.

Discussants indicated the need to recognize that there are other dimensions in the evolution of protection, beyond that of the Convention. Thus, it is important to include the influence of developments in human rights, which condition the application of the Convention, and the normative value of state practice. In fact, the problem is very often to institutionalize that practice so that future norms may be developed. This means that while political concerns are important, there are other opportunities for humanitarianism to develop practical manifestations.

Other speakers observed that the distinction between the 1951 Convention and the Statute establishing the UNHCR should be recognized. Thus, governments initially were willing to allow the UNHCR to have powers that they would not commit themselves to backing, and through General Assembly resolutions they were prepared to see an expansion of the Statute to allow UNHCR action. However, the governments themselves were extremely restrictive in their own behaviour toward refugees and, as a result, the Convention definition is an extraordinarily difficult one to satisfy.

As a final point, the question of definition was discussed; it was pointed out that different definitions of the concept of refugee exist for different purposes. Thus, the Organization of African Unity definition applies when an individual is in Africa. Indeed, the United States or Canada contribute funds to help such people because they are considered to be 'refugees'. However, if the same people try to reach the United States or Canada, a different definition of 'refugee' applies. Since the individual is no longer trying to receive care and maintenance in a refugee camp but is trying to be admitted to a Western country, the definition changes, because its purpose has changed. The reasons for this are varied, but attempts to prevent fraud and abuse have been important in producing such multiple definitions.

Discussion concluded by recognizing two important challenges lying ahead: first, the need to show that humanitarianism can have advantages in the political arena; and second, that the further development of international protection will be of no avail if national practice cannot be encouraged to follow such development.

V.
Prevention and Solutions

The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry

*G.J.L. Coles**

In this paper, I shall consider briefly what 'solution' means and entails in an approach to the refugee problem; and I shall be guided in doing so by the desire to promote, through a concept of solution that is derived from human rights, the three basic and interrelated social values of freedom, justice and peace.

Curiously, everyone refers to solution as an accepted term of art in the approach to the refugee problem,[1] but no one has considered in any depth what this concept means and entails. In fact, such scanty treatment of this concept as has been given has mostly been quite unsatisfactory. Historical factors largely explain this state of affairs, but, as I shall argue, the circumstances of the refugee problem today add reasons of political necessity to those of justice in the case for a thorough and balanced examination of the concept of solution.

The inadequate treatment of solution has been unfortunate, as solution is a notion fundamental to the formation of an approach to the refugee problem, and any misunderstanding where this concept is

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concerned is inevitably at the expense of the quality of the approach to the problem. Much of the largely justified criticism of the past approach has been that it was insufficiently oriented to solution. In fact, solution is not only the ultimate purpose of the approach but, necessarily, it determines the nature of the approach. Any evaluation of the adequacy of an approach, therefore, must depend on a correct and sufficient understanding of what solution means and entails.

As a preliminary step, I should expound the general philosophy of my approach and explain what I understand by certain key words.

I believe that an essential condition for rational and effective action is a clear grasp of purposes and principles and adequate definitions of basic concepts employed for determining and ordering that action. Such intellectual grounding is particularly required today as so much general treatment of the refugee problem has lacked an adequate basis of social philosophy and has employed a vocabulary of terms whose meaning has been vague or confused, although the terms are critical instruments for the formation of a satisfactory approach. Also, from the standpoint of law or sociology, the general treatment of the refugee problem has suffered from the generalization of the particular – the product of a particular time and place (principally the post-war European refugee problem) being made perennial and universal, regardless of changing international circumstances. The resulting failure to separate the woods from the trees of an anachronistic vision was facilitated, whether unintentionally or deliberately, by the absence of a coherent social philosophy (or doctrine), which permitted the expedient of a moment being presented as an everlasting norm. The consequences for the quality of thinking about the refugee problem have been gravely vexatious ever since.

I see human rights as the principal indices of human well-being, the recognition of which has been considered by the international community as the foundation of freedom, justice and peace (see, for example, the preamble to the 1948 Universal Declaration on Human Rights). Accordingly, the refugee problem, as any other political problem, should be approached from the perspective of human rights in order to determine the basic legal and moral nature of the problem and of the solution required. I see the approach to the refugee problem as essentially a political question, as it is one concerning the art or science of government. Human rights are not in fundamental opposition to political considerations (in this sense), but are, on the contrary, fundamentally part of such considerations, since they are the principal legal and moral indices of how to govern. The refugee problem is essentially a question of government, as it concerns the individual's relationship with a polity and the relationship of polities with one another. In principle, there is no distinction between the

welfare of the individual and that of the polity, as human welfare is secured through the polity and the welfare of the individual is the welfare of the polity and vice versa.

There is, however, a common usage of the word 'political' to mean 'partisan' or 'factious'. This is quite a different meaning from the one I have attached to the word. Unfortunately, the use of the word in the different senses has been the source of serious confusion in thinking and communication. It has led, for example, to the juxtaposition of 'humanitarian' and 'political' as opposites and, indeed, to a widespread assumption that human rights considerations are necessarily different from political considerations. This has had seriously detrimental consequences for the quality of so-called humanitarian thinking, which has been the principal victim of its own confused assumptions. In this paper, I shall use the term political in the former sense, and I shall avoid wherever possible such words as humanitarian.

Regarding the structure of this paper, I shall examine, first, the meaning of solution from the perspective of human rights. I shall contrast, then, the general deductions reached from this examination with the features of the past and present approaches to the refugee problem. I shall conclude by examining, in the light of actual circumstances, what a general human rights approach should entail generally for a humane and effective response to the refugee problem.

The Concept of Solution

In defining solution, a first step must be to define the problem that requires solving. Our ideas about solution will depend on how we perceive the problem.

In a nutshell, then, what is the refugee problem?

In a human rights approach, I suggest, the refugee problem is, basically, that of the denial of freedom of movement to the individual as a result of conditions in the country of nationality that amount to compulsion to leave that country or compulsion to remain outside that country.[2]

In this definition, the denial is not of freedom of movement generally but only of the freedom in the limited sense outlined above. Hereafter, I shall use the phrase 'freedom of movement' in that limited sense, for the sake of convenient abbreviation; and, therefore, that phrase appearing in this paper should be understood only in that limited sense.

In general terms, the refugee problem is basically that of conditions within the country of nationality that cause the exile of nationals (i.e., their enforced separation from the country of

nationality). It is not that of conditions outside the country of nationality, i.e., their reception or treatment elsewhere.[3]

This definition of the refugee problem is for broad and practical reasons only; it is not based on technical and legal criteria which serve, anyway, limited and particular purposes.[4] It has a sound and recent precedent. In its 1986 report, the United Nations General Assembly Working Group examining international co-operation to avert further mass flows of refugees identified as a decisive factor in differentiating a refugee movement from other movements, for the purposes of its mandate, the element of compulsion. Since prevention is an aspect of solution, as I shall argue *infra*, this approach, I believe, recommends itself for adoption here.

Denial of freedom of movement can be of two kinds. It can be either the deliberate action of the authorities of the country of nationality to compel a national to depart or stay outside the country of nationality, e.g., through expulsion, exile, refusal to re-admit etc., or the consequence of other conditions that are not the result of such an intention but that, nonetheless, have the effect of compelling such departure or stay, e.g., armed conflict, serious internal disturbance, persecution, famine, etc. Denial, therefore, can either be intentional (i.e., direct) or non-intentional (i.e., indirect). This is a distinction with important practical consequences for organizational responsibilities and action, as I shall show. The significance of the distinction was overlooked in the past but it is of cardinal importance for securing balanced and effective action at the international level.

It is true that freedom of movement is, strictly speaking, not an absolute freedom and, therefore, the compulsion to leave or stay is not necessarily a denial of a legal or moral freedom. But I suggest, nonetheless, that it is hard to conceive of a case of direct denial, especially a 'blanket' denial on a large scale or a permanent or indefinite one, that would be justifiable legally or morally. Today, there is a strong presumption against the legality of such measures taken against nationals as expulsion, exile and the denial of return.

It is true, also, that the denial of freedom of movement may be indirect, and that it may even have as its proximate cause a natural factor, such as famine or drought, but it is likewise hard to conceive of a case where, sooner or later, the capability of the authorities of the country of nationality would not exist to bring the exile to an end and where, consequently, a continuing state of exile was not finally intended by the authorities. Moreover, the exile of large numbers of people, including women and children, is almost always the result of gravely wrongful ways of pursuing political objectives, which must give rise to the question of whether such consequences as flight abroad were not reasonably foreseeable as a direct consequence of such ways. (Even natural factors that are the immediate cause of large-scale

'refugee' movements have, almost always, a fuller explanation in a background of armed conflict and its harmful effects on entire populations.)

It is the denial of freedom of movement that requires that the refugee situation be considered a 'problem', for the element of compulsion cannot be considered normal or unobjectionable. Efforts in the past to deny that the refugee situation was a problem stemmed from the erroneous view that any difficulty must primarily concern admission or conditions within a receiving country and from the resulting desire to avoid conceding that a receiving country could have any legitimate difficulty in admitting or allowing refugees to remain in its territory. Exile, however, is an evil – which must not be confused with voluntary migration, which is, more or less, the result of free choice. Involuntary separation from the country of nationality (which is normally the homeland) is not only sooner or later a violation of individual freedom, it is also a serious violation in view of the gravity of the human suffering normally inflicted thereby. Exile necessarily involves the deprivation of almost all human rights that are enjoyable solely, in whole or in part, within the country of nationality.

It follows from this view of the refugee problem that foreign immigration controls or conditions of stay abroad, including armed attacks on refugee camps or other violations of the physical integrity of refugees, are not part of the basic refugee problem, as has sometimes been supposed, but are only consequential or contingent aspects. These aspects result from the denial of freedom of movement and are normally resolved when freedom of movement is restored.

It is a serious distortion of the refugee problem, therefore, to present consequential or contingent aspects as part of the basic problem or, worse still, as the basic problem. It has, as we shall see, seriously adverse consequences for thinking on solution and, indeed, for the quality of the entire approach to the refugee problem. To say this is not to deny that consequential or contingent aspects are part of the refugee problem or to maintain that they should be regarded as less significant; it is only to uphold the overriding requirement of human rights that the character of the problem should be seen as primarily that of exile. Above all, I shall contend, that view of the problem is central to the question of solution.

As regards the consequential or contingent aspects, they relate not only to the refugee but also to other parties. In its broad sense, the refugee problem extends beyond the refugee and includes all other affected parties. For the convenience of general analysis, I shall refer hereafter to the denial of freedom of movement and its consequences for the refugee as 'the problem of the refugee' and to the denial of

freedom of movement and its consequences for *all* affected parties as 'the refugee problem'.

This is more than a matter of semantics, because to see the refugee problem as only the problem of the refugee, as has happened often in the past, is to have an incomplete and distorted view of the problem, with serious consequences for the resulting action. For example, it involves seeing the problem only as one arising when a person has left the country of nationality and become thereby a refugee.[5]

The refugee problem, however, is constituted not only by an actual denial of freedom of movement but also by the mere possibility of such a denial. In the latter case, two different kinds of situations should be considered. First, there is the situation of *continuity*; at the point in time of a concern over a refugee problem, there has been a denial of freedom of movement, it is continuing and it is likely to continue in the foreseeable future with the consequence of a continuing increase in the size of the refugee movement. In this situation, the concern relates not only to the accomplishment of a movement but also to a continuing process of movement reaching into the future. (Many large-scale movements take place over a period of years.) In this situation, the concern is in regard to the past, the present and the future. Second, there is the situation of *futurity*; there is a reasonable possibility of a denial of freedom of movement in the future, although none has yet taken place. In this situation, assessments concerning the future can determine the action adopted in the present, and this action may determine the actual response if and when a denial takes place.

In this view of the refugee problem, the approach, if it is to be comprehensive or balanced, must be in relation to the future as well as the present and past. Since the approach in relation to the future must address a situation prior to a transfrontier movement, it must necessarily address a situation in a potential country of origin. Prevention, therefore, should *not* be seen as an aspect apart from solution but as an integral part of it. That prevention has not been seen in the past as an aspect of solution is due entirely to this confusion of 'the problem of the refugee' with 'the refugee problem'.

Concern over a refugee movement may require not only preventive action in regard to a situation in a country of origin but also remedial action in relation to that country. In this context, *preventive* action is that action taken to prevent conditions arising that will lead to an enforced movement of people; *remedial* action is that action taken after transfrontier movement has taken place and where it is desired to obtain the conditions necessary for return. In some situations, the action may be both preventive and remedial, where it is in relation to a movement that is in the course of taking

place and where it is desired to avert a further movement and to obtain conditions that will permit the return of those who have already left. This perception is important, as the recent consideration within the United Nations General Assembly of the prevention of refugee flows failed, unfortunately, to realize that an adequate examination of preventive action required that remedial measures should also be considered. I shall return to this question.

In the light of this general analysis of the refugee problem, the following definition of the related concept of solution can now be advanced. *Solution* is either the prevention of conditions arising within the country of nationality that compel a national to depart or to remain outside the country of nationality *or* the remedying of such conditions having that effect. (This notion or order of solution I shall call 'the basic solution'). It is only in the eventuality that the basic problem of denial of freedom of movement cannot be solved that solution to the resulting problem (but *not* to the basic problem) becomes the enablement of the refugee to choose freely whether to settle in another country. (This order of solution I shall call 'the contingent solution'.) External settlement will amount to a solution of the basic problem only when the refugee freely acquires the nationality of another country and enjoys the protection of the new country of nationality. (A rider, clearly, is that the new acquisition of nationality extinguish the former nationality; otherwise, the refugee retains the rights of original nationality, and the denial of freedom of movement remains a problem requiring solution.)

This concept of solution, including the two orders of solution, has important implications for law, policy, and action.

It is clearly impermissible, in the light of this definition of solution, to treat the three traditional 'solutions' of voluntary repatriation, local settlement or resettlement as of equal order, as has so often happened in the past. They are not, since, from the human rights perspective, voluntary repatriation is the basic, or primordial, solution. Moreover, prevention is a further aspect of solution that must not be omitted in any general exposition of solution that pretends to comprehensiveness and balance. That it has been omitted has been due to the serious inadequacy of past thinking on solution.

Even such past formulations as "voluntary repatriation is, in principle, the best solution", which fall short of reflecting a right (rather than an option) of return, should be considered as unacceptable, as such wording is insufficiently exigent for the expression of a human right. The difference between the resolution of a problem of exile and the non-resolution of such a problem is not that between one 'good' that is greater than another 'good': the difference is between a 'right' and a 'wrong'. It is, accordingly, pernicious if a

formulation should imply that there is nothing inherently abnormal or unobjectionable about a state of exile, especially of a mass of people.

Emphasis on freedom as a key element in the general notion of solution, whether it be freedom of movement in relation to the country of nationality or, in a larger sense, freedom of settlement in relation to another country, accords not only with the nature of the refugee problem but also with the dignity of the individual. It is the quality of the individual's predicament (i.e., the involuntary separation from the country of nationality) that should be the focus of approach, not the mere loss or absence of a country in which the individual can lead a normal life. Solution is integrally linked with respect for the freedom of movement of the individual. It can only be inadequate, therefore, to conceive of solution as mere insertion in a country, whether it be another country or, finally, the country of nationality. The fact of insertion is secondary to the individual's enjoyment of freedom in regard to the insertion; otherwise, the individual is only a pawn on a political chess board.

In the human rights approach, the basic solution – that is, prevention or remedy – must not be seen as simply the prevention of transfrontier movement or the return of persons accomplishing such movement, without regard to individual freedom in the matter. It should be seen instead as the preservation or restoration of freedom of movement through ensuring or securing conditions within the country of nationality that permit freedom of movement. Simple prevention of movement or the enforcement of return regardless of conditions within the country of nationality constitutes a denial of freedom of movement, but this time in a more general sense of the notion and in relation to the international community, since such prevention or enforcement of return is inconsistent with the individual right of refuge, long recognized by virtue of a common humanity, in cases of enforced departure or stay abroad. Such prevention or enforced return is particularly grave, as it amounts to a total denial of freedom of movement to the individual, adding to a denial in relation to the country of nationality a further denial in relation to the world outside.

Prevention and remedy must also be seen in relation to root causes as well as immediate causes. Root causes can be considered those general conditions that led finally to those particular conditions (i.e., the immediate causes) that constitute the denial of freedom of movement. At the most fundamental level, the root causes concern the way generally human beings relate to one another. Prevention and remedy, therefore, are values and goals that lead to a basic examination of human nature and behaviour. Indeed, exile has been seen in the history of religious thought and tradition as the direct and most profound consequence of human transgression of the Divine

Law. The basic solution, therefore, must be seen finally in relation to a general moral or spiritual state and to what is seen as necessary for the gradual perfection of the human being. However, the examination of causes, if it is to lead to the adoption of immediate and practical preventive measures, must distinguish between remote (or root) causes and proximate (or immediate) causes. It is in relation to the latter causes that immediate and practical measures of prevention can be considered. Failure to distinguish between the two orders of cause has led, unfortunately, to a general and inconclusive consideration of prevention. I shall examine this aspect *infra*.

The full nature and extent of the modern evil of exile is one that has still not received adequate attention. There has been a strong tendency, instead, to concentrate on palliative measures, which, often enough, have been either inadequate or unavailable, ignoring the actual suffering of the millions of traumatized persons who have been forced to leaving their homelands as a result of oppression and violence.

Prevention and remedy gain immediate practical significance from the fact that as the refugee problem is essentially one of disorder and violence, a sufficient solution cannot be found in a *post factum* response that does not deal adequately with the two basic and interrelated issues of causes and solution. This is not only a matter of principle but also one of reality. Law and justice cannot be assured adequately on a basis of lawlessness and injustice. Experience shows that disorder and violence can attain such a dimension and possess such a character that the persons affected, even if they can find refuge abroad, may find themselves in circumstances that are precarious, difficult and even dangerous. In today's reality, refuge abroad is not assured to all, regardless of circumstances; nor is refuge abroad necessarily an improvement for the persons concerned, let alone any kind of solution. Today, many are denied refuge, and the conditions of exile for the great majority of the world's refugees are harsh. Many have been denied any kind of solution for many years, even decades.

Prevention and remedy are imperative requirements of humanity; and they are, also, elementary requirements of law and justice. The basic principle stands that the solution to a problem of the denial of a right is respect for that right. This is an elementary consideration, the recognition of which contributes to peace, the rejection of which contributes to violence.

Exile in the form of external settlement, therefore, is only acceptable as a solution (i.e., as a contingent solution) when every effort necessary and possible has been made without success to obtain conditions within the country of nationality that will restore freedom of movement. Failure to make that effort amounts to a further act of injustice.

Furthermore, solution should be seen as the responsibility of the entire international community. In fact, concern for solution has been at the basis of international co-operation since its inception nearly 70 years ago. This concern creates not only a right of intervention but also a *duty* of intervention to secure, first of all, the preservation or the restoration of freedom of movement. The value and the goal of the preservation or restoration of freedom of movement are expressed in the corpus of human rights law by such principles as the prohibition of expulsion or exile and by the right of return. These human rights are cardinal principles governing the approach to the refugee problem, since that problem is basically a human rights one that should be solved in accordance with these principles. In accordance with its responsibility to ensure respect for these principles, moreover, the international community is bound, by the basic principles that constitute it and govern its life, to do whatever is necessary and possible to secure respect for these principles.

In defending and promoting the primordial value and goal of the preservation or restoration of freedom of movement, the international community is also acting in accordance with the desire of the refugee, for no one normally can desire to be separated involuntarily from the country of nationality.

It follows that measures taken internationally in response to the refugee problem should be directed primarily, where solution is concerned, to seeking and obtaining the basic solution, and that, conversely, nothing should be done that prejudices unnecessarily efforts to seek and obtain that solution.

It may be that a particular historical statement of principles or rules or a particular organizational mandate elaborated in relation to the refugee problem of a particular time or place, such as the United Nations 1951 Convention or the 1950 UNHCR Statute, relates to only a part of the refugee problem, as where, for example, it is addressed principally to a situation outside the country of nationality; but the general requirements of human rights are that such statement or mandate should be expressed or interpreted in a way that is in basic harmony with the nature of the refugee problem and with the required solution. Such statement or mandate must not serve, either in theory or in practice, to conceal or undermine the primary importance of prevention and restoration of freedom of movement. While, from the perspective of a particular statement or mandate, the immediate concern in relation to the refugee problem may be securing immediate refuge and assistance, the larger concern in relation to solution must not be obscured or downgraded. If the statement or mandate should do so, it is fundamentally unjust.

As the denial of freedom of movement entails necessarily the loss of the enjoyment of the rights of nationality enjoyable only within the

country of nationality, the notion of the basic solution must be understood as encompassing also the preservation or restoration of the enjoyment of such rights. Likewise, the notion of the contingent solution must be understood as encompassing not only physical settlement but also the enjoyment of all the normal rights of settlement. In the cases of both orders of solution, the enjoyment of the rights of nationality or of settlement amounts to the possession of a national community. The possession of a national community is important to an individual because of the social nature of the human being and because of the indispensable role of such a community in human well-being, development and security. Without a national community, the individual is isolated, deprived and vulnerable.[6]

This view of the element common to both orders of solution is broadly in conformity with the general notion of solution described in the 1950 Statute of the Office of the United Nations High Commissioner for Refugees and implied, as regards external settlement, in the 1951 Convention Relating to the Status of Refugees. In paragraph 1 of the Statute of this Office, the High Commissioner is given the function *inter alia* of:

> seeking permanent solutions ... by assisting governments ... to facilitate the voluntary repatriation of such refugees or their assimilation within new national communities.

In Article 35 of the Convention, the Contracting States undertake to facilitate as far as possible the assimilation and naturalization of refugees.

The term 'assimilation', which appears in both instruments, has since been dropped from ordinary usage, and the terms now preferred are 'integration' or 'settlement'. In this paper, I shall use the latter term.

In regard to the basic solution, practice establishes the necessity of seeing solution as more than mere entry into the country of nationality but as a process of return that terminates only with the accomplishment of a normal and, apparently, durable re-insertion into the original community. This has important implications for the mandate of UNHCR, in relation to protection as well as assistance.

In regard to the contingent solution, the legal contours of solution are traced in some detail in the 1951 Convention Relating to the Status of Refugees. Under the Convention, lawful stay entails rights concerning expulsion, freedom of movement, gainful employment, welfare, access to courts, association, movable and immovable property and so on. Also, this instrument includes a general obligation of the Contracting States to facilitate as far as possible the assimilation and naturalization of refugees.

Acquisition of a community is not aptly described, therefore, by a phrase such as 'self-sufficiency'. Unfortunately, this phrase has come into vogue in recent years. Such a phrase, applied to solution, appears to reduce drastically the concept of solution. It is possible to be self-sufficient, whatever this term means, without being settled in the receiving country.[7] Indeed, self-sufficiency, in a narrow economic sense, is conceivable in cases of detention or restriction on freedom of internal movement. Even a prisoner can be self-sufficient, in this sense, by weaving baskets or making water pots. As I have argued above, solution must be seen in relation to human well-being as a whole. Self-sufficiency is only a small part of that well-being; for the longer term, the refugee who has decided freely to make a new and normal life outside the country of nationality desires usually to have a full life in another national community, participating in its political, social, economic and cultural activities. The refugee, in short, is an ordinary human being, not just an economic unit in someone else's accounting book.

For either order of solution to exist, there must be not only normal re-insertion into the national community or normal settlement in a new national community; there must also be a reasonable possibility of durability of stay. Where there is a reasonable possibility that continued stay will not be possible – leaving aside the case of the contingent solution where restoration of freedom of movement in relation to the country of nationality may be possible later – a solution does not exist. An ephemeral state where stay is concerned is not consistent with a normal notion of solution. In regard to a contingent solution, the absence of a solution is indicated either by conditions of stay that fall short of the requirements for settlement or by the fact that the stay is limited in time, i.e., non-durable. The classic instance of a non-solution is the refugee camp.

It can only be contradictory, therefore, to employ, as has been the case in recent times, such phrases as 'intermediate solution' or 'temporary solution' in relation to such non-durable situations. In these situations, no solution exists; it is only the conditions of stay or the stay itself that are 'intermediate' or 'temporary'. Instead of the word 'solution', some other word, such as 'arrangement', should be employed, so as to leave no doubt that a solution does not exist. Solution is too important to the welfare of the refugee to be a term from which all substantial meaning can be happily evacuated.

Also, the problem of the refugee should not be considered solved when the refugee has been granted 'asylum', unless the concept of asylum is understood as including solution in the sense of external settlement. If asylum is not conceived as necessarily including local settlement and is considered as being no more, or little more, than mere physical presence qualified by the principle of *non-refoulement*,

as some have maintained, then care should be taken that phrases such as 'the country of asylum' are not misunderstood. There is no doubt in this writer's mind that the term 'asylum' is frequently used to imply a solution, if only because 'asylum' is often presented as the ultimate or comprehensive qualification. To avoid such undesirable confusion, it has been proposed elsewhere that refuge that does not amount to a solution should be called 'temporary refuge' or by some other phrase (such as 'temporary safe haven'), while refuge amounting to a solution should be called 'asylum'. In whatever way the problem of terminology is handled, there should be no major disagreement over the meaning of 'asylum' where solution is concerned. There should be general agreement that either it implies solution or it does not; solution is too important for human well-being to be side-stepped by recourse to ambiguous or misleading words or phrases.

A clear and sufficient understanding of solution provides the necessary criteria for distinguishing between those situations where a solution exists and those situations where no solution exists. Such criteria are essential to ensure that situations that fall short of providing a solution will not continue indefinitely because they are erroneously considered to amount to a solution. The protection of the human being, particularly in the difficult circumstances of today, requires absolutely that such criteria be identified clearly and sufficiently.

Sometimes a temporary arrangement may have to last a considerable time before a solution can be found; this is frequently the case where return is concerned and not infrequently where the solution is resettlement. It would be unjust, however, for a temporary arrangement to last for too long, so that the refugees are denied over many years any normal life in a national community or, worse still, are forced against their will to live indefinitely in harsh, precarious, and sometimes dangerous circumstances. That this has happened, and that there are scandalous instances of peoples being denied a solution for decades, are striking examples of the gravity and inhumanity of a number of instances of the modern refugee problem.

In the general definition of the refugee problem I have offered, it is basically the refugee who has the problem; but the refugee can pose a problem for others, such as the receiving country, a potential country of resettlement or a donor country. For the receiving country, the problem may be national security; for the potential country of resettlement it may be limited absorptive capacity; and for the donor country, it may be limited assistance capacity.

It happens not infrequently that efforts to define solution refer to elements of problems for different kinds of parties. The resulting heterogeneous definitions can be confusing and prevent the formation of a rational and effective approach.

It must be kept in mind that the concept of solution depends for its meaning on the nature of the problem to which it is related. As I have argued, in the case of the problem of the refugee, the denial of freedom of movement and the consequent loss or absence of a community necessarily antedate and give rise to the problems of other parties. The latter problems are contingent, dependent on the existence of the former problem. As the former problem is basic, its solution must be determined basically in relation to it and not in relation to contingent problems.

Let me give an example of the kind of difficulty that can arise as a result of a mixed definition, i.e., a definition including elements of different problems of different orders. Many such examples could be given, but this one may suffice.

In 1979, a governmental representative, speaking on a proposed Fund for Durable Solutions, told the UNHCR Executive Committee:

> The solution to refugee problems in the final analysis lies in being able to give the refugees the opportunity to establish new, self-sufficient lives. However, today's refugee concentrations are found overwhelmingly in developing countries which lack sufficient resources to provide for their own populations. Ways must be found to alleviate the economic, financial and social strains on asylum countries.

It is clear, here, that self-sufficiency is not the principal concern of the refugee, for whom a solution must mean, finally, the eventual regaining of the old community or the acquiring of a new one. Furthermore, it is clear, too, that the lack of self-sufficiency and the material strains on the asylum country are only the consequence of the loss and non-acquisition of another community. In addition, the economic, social and financial strains on asylum countries may not be their only problems; indeed, the political and security problems in providing local settlement may be uppermost in their minds. (This was the case with the Southeast Asian states to whom the proposal for a Durable Solution Fund was mainly addressed.) The key to solving the problem of the refugee therefore lies in the regaining of the old community or the identification of a new one; it does not lie in self-sufficiency by itself or in relieving the material strains on asylum countries, regardless of whether such countries wish, or are able, to provide a solution.

Also, a concept of solution that relates only to the problem to the refugee of the loss of a community and that does not also include the problem of the circumstances surrounding and qualifying that loss is inadequate. Those circumstances may include separation of families, unjust condemnation and seizure or confiscation of property. Action

for solution must be addressed finally to the full nature of the problem of the refugee. This is an important perception, too often overlooked in practice. It is still widely assumed, for example, that external settlement by itself is a solution; yet international law and practice bear out amply that there may be other issues, such as family reunification, restitution or compensation, that should properly be addressed as well. And in the case of return, elementary considerations of justice may dictate that earlier legislative, judicial, or administrative measures taken against the refugee should be declared null and void and that compensation or restitution should be made. A 'solution' that ignores such elementary considerations of justice or humanity is not a solution in any adequate sense of the term. This is an aspect of solution that deserves much more attention than it has received so far.

Finally, in regard to protection, solution both controls the nature of protection and also, in turn, is controlled by protection.

The identification of solution determines the nature of protection. This is a truth that has often been forgotten, mainly because of the traditional "exilic" bias of the approach to the refugee problem, which I shall examine *infra*. If the solution is local settlement, the protection is that appropriate to the attainment of that solution; if the solution is resettlement or eventual return, the protection is appropriate to the attainment of the particular solution. Moreover, the identification of the solution facilitates the implementation of protection. Where no solution is in sight, protection problems tend to be serious, particularly in situations of mass influx; conversely, where the solution is identified, protection problems tend to diminish. Solution, therefore, is a critical element in the extension of protection. The detachment of protection from solution, as happened in thinking on the refugee problem from the early 1960s until recent times, can only lead, sooner or later, to severely detrimental consequences for both thinking and action, as I shall show *infra*.

In action in response to a refugee situation, therefore, the identification of solution can be seen as of the first importance, since the identification of solution determines the nature of protection and facilitates its implementation.

The ultimate purpose of protection, however, is solution, and protection determines what is, or what is not, a solution.

In the refugee situation, international protection should be seen as a temporary holding arrangement between the departure and return to the original community or as a bridge between one community and another. Legal protection is the formal structure of that temporary holding arrangement or bridge: it is not, however, a static or non-purposive application of disconnected human rights, as

the tendency in the past was to see it, but it is a dynamic means to defend and, ultimately, to secure the totality of the refugee's rights, including that to a community. In short, protection ensures that the entire approach to the refugee problem, in relation to both the goals and intermediate steps, rests firmly within the general framework of human rights.

The Approach of the Past and Present

The prevailing international approach to the refugee problem during the last 40 years has been profoundly influenced by two major sets of circumstances. I should outline these briefly as it is not possible to evaluate satisfactorily the approach of the past and of the present without some knowledge of these circumstances.

The first set of circumstances is that of the Cold War period, from the late 1940s to the end of the 1950s; a period that saw the adoption of the 1950 Statute of the Office of the United Nations High Commissioner for Refugees and the signing of the 1951 Convention Relating to the Status of Refugees by a group of States, mainly consisting of Western countries. These instruments remain in force, although the reality of the modern refugee problem, as well as the general circumstances of today, are quite different.

Both instruments were inevitably products of their times. A cardinal factor influencing their approach was the polarization of the Western and Eastern blocs into two hostile camps and their adversarial attitude, which necessarily influenced the entire approach to the East European refugee problem of that time.

Firstly, the cause of the refugee problem was identified by the dominant Western group as persecution *simpliciter*, and, for various reasons, the principal solution to the problem was seen as external settlement. Also, the overriding strategic concerns of the dominant group obscured the central significance, from the human rights perspective, of freedom of movement to the individual. In a widely prevalent Western view of the time, refugee movements were good, providing the receiving countries with the means of attacking an adversary as well as manpower for reconstruction and development. Furthermore, for some, flight or expulsion leading to external settlement was sometimes a necessary solution for a minority problem.

Initially, a proposal to include a provision on seeking solutions for the problem of the refugee within a statute for an Office of a United High Commissioner for Refugees, as one of the two main functions of such an office, was strongly resisted by two (Western) permanent members of the Security Council; and the final formulation on solutions, in paragraph 1 of the Statute, was a compromise between

two opposed Western views, in which the function of seeking solutions was mentioned only after the function of international protection. Also, the provision for the protection of the refugee, under the Statute, was conceived mainly in regard to the receiving countries (paragraph 8), the activities of repatriation and resettlement being made expressly subject to the determination of the General Assembly and to the limits on resources placed at the High Commissioner's disposal (paragraph 9).

Because the perception of the problem and its solution as reflected in both the instruments sharply divided the two blocs, both instruments were inevitably drawn up on the basis that co-operation between the two groups was impossible and that the only co-operation conceivable was that of the receiving countries. The result was that the approach taken in both instruments was confined to the problem of the refugee, and, in the case of the Convention, concerned external settlement exclusively. In the case of the Statute, voluntary repatriation was mentioned as a solution, but the reality of the time was that this was only lip service to a solution that was considered by the Western States as neither significant nor really desirable.

In substance and intention, therefore, both instruments reflected an 'exilic' bias in regard to the solution of the refugee problem. This bias influenced, of course, the entire approach, whose thrust was directed almost exclusively to separation and alienation. As I have mentioned, the 1951 Convention was exclusively an instrument for the external settlement of the refugee; and the 1950 Statute, foreseeing no role for UNHCR as a mediator or interlocutor between the refugee and the country of nationality, envisaged the new agency's functions primarily in regard to insertion within new national communities. (Thus, the solution of external settlement was seen as a 'permanent' solution, the term 'durable' appearing only a few years later in relation to quite different international circumstances that were then beginning to emerge.)

The charge of the Eastern Bloc that both the law and the institution were the product of partisan (or factious) considerations and that they served primarily the interests of the Western countries and not those of the refugees themselves led to a vigorous counter-assertion by the Western countries that the Convention was purely a human rights instrument, valid universally, and that the Statute contemplated only entirely 'humanitarian' and 'non-political' work for the new agency (a proposition incorporated into paragraph 2 of the Statute).

Both charge and counter-assertion contained elements of truth. Undoubtedly, the Convention was tailored by the Western Bloc for its own purposes in dealing mainly with the Eastern European refugee situation, favouring a particular characterization of the cause of the

refugee problem and a particular solution. Also, this characterization was not always helpful to the refugee, who might find that the possibilities of family reunification or return were not enhanced by public designation as a victim of persecution. Moreover, the Office, conceived at the height of the Cold War and intended to deal primarily with the Eastern European refugee problem, could hardly avoid functioning in a way that would be considered by the East European bloc, at least, as partisan or factious. (In fact, many non-Western countries, especially those in Asia and the Middle East, kept their distance from the approach, which they saw as serving essentially Western interests.) However, there were important elements of human rights in the Convention that were of enduring relevance; and the Statute of the Office contained sufficient elements to confer on the new international agency the potential to develop a flexible approach to the changing international refugee problem that developed in the years ahead.

The Convention, nonetheless, was not a suitable model for universal application. This was apparent almost immediately, when a wider concept of 'refugee', as well as a different approach to the refugee problem outside Europe, developed at the practical level. However, legal and general thinking, influenced by the 1951 Convention, failed to keep pace with the development of practice, and in the succeeding years, the gap between theory and practice widened increasingly. There is no hiding the negative effects on thinking and on action that the postulation of the Convention as the central statement of the correct approach to the refugee problem had in the succeeding decades, up to present times. Law especially became increasingly divorced from reality; instead of the law becoming a means to channel thinking and action along lines of humanity and practicality, it became, in many situations, a cause of distorted thinking and inappropriate action. Nowhere is this more true than in regard to solution. One result was that international refugee law, conceived principally as the application of the Convention, increasingly lost its relevance and utility. The mistaken action of making the Convention the basis of general thinking had the unhappy effect of blocking the development of a general doctrine that could invigorate and develop thinking on the refugee problem. In their periodic lectures to the Hague Academy of International Law between 1951 and 1976, the High Commissioners ignored completely the aspect of prevention and remedy, and they dismissed the solution of voluntary repatriation in a few lines that took no account at all of the importance to the individual and society of the freedom to return in safety and dignity.

Deprived of an adequate basis in positive or conventional law and of any general doctrine to guide its action in the years ahead, the

work of the Office of the United Nations High Commissioner for Refugees suffered heavily.

The 'exilic' bias of the early approach had many far-reaching theoretical and practical consequences.

Firstly, the consequential or contingent aspects of the refugee problem were made the basic aspects. The basic refugee problem, therefore, was not about exile but about admission and stay abroad. It followed that the basic solution was principally external settlement, eventual return being a possible solution of equal order but not of equal practical significance. (Anyone wanting to return, and they were many, had to make arrangements independently of UNHCR, which was a *persona non grata* to the countries of nationality).

Secondly, the adversarial approach to definition (i.e., the problem must concern persecution and not something more complex or different, as in the case of war) ensured that the element of the co-operation of the country of nationality was effectively excluded from thinking *a priori*. Prevention and remedy, therefore, were ruled out as practical possibilities, and, in view of the political polarization that the approach both reflected and represented, the consideration of causes in an open and objective manner became impossible, although it was unquestionably an essential pre-condition for a humane and effective approach. The difficulty raised by a debate over causes or the possibility of preventive or remedial measures was dodged by the expedient of calling the question of causes or such measures a 'political' matter (i.e., inappropriate in the consideration of a 'purely humanitarian' matter). The term 'humanitarian', of course, was no more than a rhetorical device for avoiding controversy over questions that were political by their nature.

Furthermore, return, in this approach, was an inherently suspect solution, let alone a solution that could be sought actively. To emphasize voluntary repatriation as a solution was seen as almost a betrayal of the spirit of the '*humanitarian*' work for refugees. It was also not in the interests of the receiving countries. The right to choose freely to return or not was strongly underscored, but paradoxically, no attention was given to the fact that no real freedom of choice could exist anyway where conditions in the country of nationality were such that, for one reason or another, return was inconceivable. Doing something about conditions in the country of nationality, whatever it might be, was ruled out *a priori* and considered quite outside the scope of an approach to the refugee problem. Given the conception of the problem, including the characterizations of its cause as 'persecution', the basic task was that of separation and alienation (a 'humanitarian' activity), reconciliation and restoration being dismissed as a 'political' activity that a 'humanitarian' organization like UNHCR should not be asked to perform.

In addition, the refugee problem came to be seen as only the problem of the refugee, the wider aspects of the problem disappearing entirely from view, relegated to the area of other (and more general) concerns.

Also, consideration of the refugee problem became increasingly detached from consideration of human rights problems generally as well as other wider problems, such as those of justice, peace or development. This was mainly because consideration of those other problems posed awkward questions that challenged some of the main assumptions behind the statement of the positive law relating to refugees and behind much of the action taken in regard to the refugee problem. Consequently, the refugee problem came to be seen by many as *sui generis*, to be considered in the light of its own (i.e., arbitrarily determined) purposes and principles and not in relation to more general purposes or principles.

Similarly, the general consideration of the human rights problem, such as the right of return or exile or expulsion, came to be seen as not including the refugee problem, which was to be considered according to its own autonomous principles.

In short, a process of intellectual fragmentation ensued, separating the refugee problem from human rights; the harmful consequences of this fragmentation still bedevil much thinking about the refugee problem today, rendering difficult the determination of principled and pragmatic action.

The second set of circumstances is that of the emergence and development of new states in the era of decolonization, beginning in the 1950s.

These circumstances were to be relevant to the approach to the refugee problem within the Third World, although the approach to the problem in the West continued to be influenced largely by the circumstances of Europe in the earlier period. In effect, the approach to the problem within the Third World was separated from the approach to the problem in Europe, the two co-existing approaches being significantly different from each other in both nature and scope.

In the new set of circumstances, the question of the causes of the refugee problem came to be seen as more complex and sensitive than in the East-West context; as a result, the question of solution was seen as less simple. The colonial powers denied that the refugee movements created by national liberation struggles were the result of 'persecution'; in the complex circumstances of internal problems within newly independent states, which also generated refugee movement, the question of the characterization of the cause of movement was considered a sensitive one for the newly independent states and was made secondary to the need to obtain the broadest possible basis for co-operation. Moreover, the newly independent

States, increasingly numerous in the United Nations General Assembly, came to see solution as central to the approach to a refugee problem created as a result of a national liberation struggle: for these States the right to self-determination required that the approach to the refugee problem in the circumstances of a national liberation struggle should be governed by the principle of the solution of return in safety and dignity, i.e., following the grant of self-determination. For much of the time, however, no general agreement could be found on this within the United Nations.

The various complex and competing factors led to an unfortunate compromise. The question of solution, in general thinking, was increasingly relegated to a marginal or secondary position, so as to avoid political controversy, and the approach to the refugee problem came to be directed increasingly to a static or 'threshold' approach. Protection came to be divorced from solution, so that protection principles ceased to be seen as a dynamic process leading from the loss of a community to the regaining of the old, or to the gaining of a new community. Protection principles came to be seen instead as a static and disconnected statement of individual human rights ungoverned by solution. Assistance came to be seen increasingly as emergency aid, the notion of solution finding an awkward location in assistance thinking and becoming increasingly coloured by economic or assistance considerations. The increasing conferment of responsibility for 'solution' thinking on assistance experts led to the desiccation of the human rights element in the thinking on solution. Hence, solution came to be seen finally as 'self-sufficiency', and the treatment of solution, from a protection standpoint, was almost non-existent.

In the last few years, a third set of circumstances has appeared: the phenomenon of refugee movements from the countries of the South to the developed countries of the North. This development has gradually broken down the separation of the approaches to the first and second sets of circumstances, forcing the evolution of an approach that takes account not only of elements of both the earlier approaches but that also recognizes the need for a widening of approach to encompass prevention and remedy (the basic solution) as well as external care and maintenance (intermediate arrangements) and settlement (the contingent solution). Moreover, the approach has required that the subject of causes receive objective treatment, an essential pre-condition for a rational and effective response based on general and balanced international co-operation, without which the satisfactory solution of the modern problem is no longer conceivable. The exilic bias has been called into question; the marginalization or downplaying of solution has been challenged; and support has been gathering for a general human rights approach to the refugee problem

and its solution. The adversarial approach, or its opposite (i.e., non-involvement in the question of causes), is now giving way to a more pragmatic approach necessitated by the interdependence of continents. Finally, general co-operation is inevitably *becoming* the basic principle, or goal, of a new approach.

In face of the new set of circumstances, which is truly proving a watershed in the approach to the refugee problem, the countries of the North have initiated discussions within the United Nations on the causes of the refugee problem. These discussions are revealing the complexity of the modern problem and the serious inadequacy of attributing the main cause of today's problem to a classical notion of 'persecution' (i.e., a grave violation of civil and political rights). At issue now are wider questions, including respect for social, economic and cultural rights, development, the non-use of force, non-intervention in internal affairs, solidarity, and so on.

In recent years, countries in the North have also promoted discussion within the United Nations of the prevention of mass refugee flows. They have also stressed the central importance of solution for international aid planning in the face of the bottomless pit of aid projects for unsolved refugee problems. ("Time for solution" has been a popular catchphrase.) Voluntary repatriation has been emphasized as a solution, no longer one that should be ignored or just allowed to happen, if at all; and the practice of 'temporary refuge' was proposed by one Western country for examination as an expedient to gain time to obtain satisfactory durable solutions, thereby easing protection problems resulting from the large scale of the influx. (This proposal, one of the first in response to the contemporary problem of large-scale influxes, ran inevitably into the opposition of those formed in the mould of the traditional exilic bias, who considered that anything that put into question the primacy of external settlement as a solution was undesirable.) And, finally, the countries of the North have begun to express concern over such refugee-producing practices as expulsions, exile and the denial of the right of return.

More generally, there has been a resurgence of study of the refugee problem, the archaic diagnosis and treatment of the 'positive' lawyers who helped for so long to distort and confuse thinking on the refugee problem yielding, at last, to the beneficial contribution of political scientists and historians, who have, finally, brought consideration of the problem down to the level of reality and have opened the way, intellectually speaking, for action that is both principled and pragmatic.

For their part, the developing countries of the South have been moving largely in the same direction, within both the various regional contexts and the international one. And, significantly, the socialist countries of Europe, after decades of reservation, if not outright

hostility, to the prevailing or dominant approach, have begun to express their interest in general international co-operation along the lines of a new approach to the refugee problem.

The Future Approach

A central thesis of this paper is that there is now a general convergence of interests in favour of the development of a new approach to the refugee problem to meet today's circumstances. Such an approach should be both principled and pragmatic. In this writer's conviction, it can only be one based on human rights, which are applicable directly to the refugee problem and which are universally recognized as the foundation of freedom, justice and peace. Furthermore, in view of the complexity of the modern refugee problem and the multifaced character of the aspect of causes, as well as the importance of securing international co-operation, the approach must be animated at the levels of policy and action by the twin principles of reconciliation and restoration. The goals of separation and alienation, which animated so much of the approach of the past, should be recognized as contrary to both individual human interest and the well-being of societies, particularly in today's conditions.

This new situation is facing the Office of the United Nations High Commissioner for Refugees with an important challenge. As it is increasingly clear that the traditional approach of the past is now inadequate, States are looking to see if the Office, whose principal task it is to assist them to see the human element from an international or long-term perspective, can use its intellectual and moral resources to bring the international community into a new period of principled and pragmatic action.

In developing the approach to the refugee problem, the notion of solution is fundamental, not only in regard to the purposes of the approach but also in regard to the means (or principles) by which these purposes can be attained. Solution must be understood in the context of human rights generally. In view of the inadequate treatment so far of this critical element of solution, the notion of solution should now receive close attention so as to facilitate – indeed, permit – the renewal of thinking on law, policy and action. Such renewal is indispensable, in this writer's view, to the formation of a humane and effective response to the refugee problem today.

This renewal could be initiated most satisfactorily by the development of a general doctrine on the refugee problem that would provide the inspiration and guidance necessary for the development of law and action. An important development has already taken place in the emphasis that the new United Nations High Commissioner for Refugees has placed on the significance and role of doctrine for his

organization. It remains only to elaborate such a doctrine in a comprehensive and balanced manner.

The general purposes and principles of the approach should be identified, and key concepts or terms should be clarified. Much work needs to be done in this area, as there have been distortions in the formulation of the purposes and principles, and almost all the key concepts or terms are now confused or vague.

In this writer's conviction, the entire international community should now be engaged in the task of renewal. The nature of the problem requires that, at the levels of theory and practice, a general contribution be made to the solution of the problem, since a general human and social interest cannot be served by a partial or incomplete contribution to a problem that is by its nature truly international in scope.

In a renewed approach to the refugee problem, a central international agency, such as the Office of the United Nations High Commissioner for Refugees, should see itself as primarily a human rights agency, working within the context of human rights at both the legal and the practical level. While aid must remain an important aspect of the agency's work, the human rights principles of the agency must determine the general purposes and principles of its work. Respect for these rights can best be ensured through a principled and pragmatic approach to the basic issue of solution, an approach that is animated by an active and impartial adherence to a policy of reconciliation and restoration. It is a remarkable aspect of the new United Nations High Commissioner that he has already begun, courageously, the difficult and delicate task of renewing his organization in this spirit. He needs the international community's encouragement and support in this important but difficult task.

In particular, areas that should now receive attention include the following:

- *The nature of the refugee problem*: This should be seen as basically that of exile. More attention should be given to the reality of the human experience of exile today, to what it means to the millions of human beings who experience it. The approach to the refugee problem should rest primarily on the perception of the evil of exile and on the need to combat it.
- *The aspect of freedom of movement*: The approach to the refugee problem should start from the premise that the problem is basically one of denial of freedom of movement to the individual and that human dignity requires respect for that freedom.
- *The element of compulsion*: This element should be identified, for the purposes of a general approach, as the essential distinction separating one broad kind of transfrontier movement (i.e.,

involuntary separation from the country of nationality) from another (i.e., voluntary migration). This distinction has significant consequences for law, policy and action that should be carefully explored.

- *Direct and indirect denials of freedom of movement*: The implications of this distinction between the two kinds of denial of freedom of movement should be studied. In this writer's view, the direct denial of freedom of movement (e.g., by expulsion, exile or denial or return, etc.) should properly be considered a central and integral aspect of the refugee problem, requiring that law, policy and action so consider it. Hence, for example, the Office of the United Nations High Commissioner for Refugees should consider that such direct denial concerns its mandate in a basic manner and it should also consider that ensuring respect for rights that concern individual freedom of movement is a basic aspect of its mandate. Accordingly, the Office should play an active role ensuring respect of these rights, complementing, in a basic manner, its traditional task of ensuring protection through admission to another country, according proper conditions of stay and assuring the voluntary character of return. To place the emphasis only on respect for the latter group of rights is to unbalance fundamentally the approach to the refugee problem. Respect for rights relating to the fact of belonging to a country is a fundamental aspect of protection requiring much more attention.
- *The distinction between the problem of the refugee and the refugee problem*: A humane and effective response must be in relation to the general problem (i.e., the refugee problem) and not solely in relation to the particular problem (i.e., the problem of the refugee). This principle has important implications for the formation of law, policy and action. Today, more than ever, the problem of the refugee can be addressed adequately only within the context of a general approach addressed to all the parties affected by the involuntary separation from the country of nationality. Even protection, therefore, must be seen in relation to that general context and should not be formulated solely in relation to the problem of the refugee. Furthermore, refugee law should not be conceived as concerning only, or primarily, protection but as concerning all relevant aspects of the refugee problem. This is an important perception for the renewal of the traditional statement, or understanding, of law and policy and of the directions generally for action.
- *Notion of solution*: In accordance with this perception of the refugee problem as basically that of the denial of freedom of movement through involuntary separation from the country of

nationality, the notion of solution should be primordially that of the prevention of the conditions arising within the country of nationality that compel a national to depart or to remain outside the country of nationality or the remedying of such conditions. The notion of solution as external settlement should be recognized as solution only of the problem resulting from the failure to solve the basic refugee problem. Such an approach to solution is both principled and pragmatic and should be considered fundamental to an adequate response to today's problem. While the countries of the North have resisted firmly efforts to widen the traditional Western attribution of the cause of the refugee problem (i.e., persecution) to include other causes for the purposes of extending existing treaty laws and institutional mandates, they have done so principally because the traditional approach to solution, including the exilic bias, is considered no longer helpful or appropriate. In this writer's view, they are clearly right. It is remarkable, however, that when the question of the attribution of the causes is posed in relation to the consideration of a new and wider approach to solution, including prevention and remedy, the countries of the North adopt a more open approach. The lesson is plain: the key to solving the problem of a wider definition of a refugee, for the purposes of law and organizational competence, lies in widening the approach to solution.

- *Prevention and remedy*: These two aspects of the basic notion of solution should be studied further to determine how law, policy and action can be developed progressively to respond to the refugee problem in a more balanced and effective manner than hitherto.
- *Distinction between orders of causes*: This distinction should also be studied further to determine what immediate practical measures of both a preventive and a remedial nature can be taken, as well as what longer-term measures are needed for the solution of the problem.
- *The basic solution of return*: More work needs to be done on this basic aspect of solution, particularly in relation to the primary requirement of freedom of movement (i.e., that conditions within the country of nationality should be such that the national will be able to exercise real freedom of choice in relation to that country). It should be recognized that ensuring the voluntary nature of the decision to return is meaningless if the national has no real choice in the matter because of conditions in the country of nationality that compel stay abroad. In addition, the solution of return must be considered accomplished only when an initial process of durable re-insertion within the country of nationality

has been accomplished. More work needs to be done on this aspect, particularly in relation to the extension of international protection prior to the accomplishment of this process.

- *The contingent solution of external settlement*: More work needs to be done on the contingent solution of external settlement, particularly in regard to the criteria for determining when such solution exists and in regard to terminology. The criteria of the 1951 Convention are, by and large, still applicable for external settlement in developed countries, but they are largely inappropriate to contemporary conditions in many developing countries. Also, the notion of 'asylum' should be clarified in relation to the central requirement of solution.
- *Family reunification, annulment of laws, decrees, etc., restitution, compensation*: More work needs to be done in this area to give greater legal and doctrinal substance to the general notion of solution.
- *The relationship of protection to solution*: This aspect should also be clarified, the implications of the primary importance of solution to protection being studied in relation to law, policy and action; and the dynamic and solution-oriented nature of protection should be examined in relation to the question of the adequacy of existing law, policy and action.

Conclusion

I should like to end this study by reiterating my conviction that the notion of solution in relation to the refugee problem means and entails basically the prevention of the denial or, in the case of denial, the restoration of freedom of movement in relation to the country of nationality. This emerges clearly from examining the notion of solution in the context of human rights. In addition, I have argued that it is only by ensuring respect for human rights generally that an adequate general notion of solution, including its consequential or contingent aspects, can be obtained—one that will be adequate for determining, on a principled and pragmatic basis, the directions of law, policy and action that are required to meet the refugee problem today. What these directions are I have tried to set out in this paper.

Notes

1. For example, paragraph 1 of the 1950 Statute of the Office of the United Nations High Commissioner for Refugees provides that

one of the two functions of the High Commissioner shall be "*seeking permanent solutions for the problems of refugees*".

2. In its broad sense, freedom of movement implies the liberty to stay put as well as the liberty to move.

3. As I shall argue *infra*, these latter conditions are only consequential or contingent aspects of the refugee problem.

4. It should not be understood as implying, for example, that a refugee must be a national of the country of origin, or that everyone termed a refugee, particularly in a large group, was necessarily compelled to leave the country of nationality or origin.

5. The Statute of the Office of the United Nations High Commissioner for Refugees, which provides that one of the two functions of the High Commissioner shall be "seeking permanent solutions for *the problems of refugees*" (my emphasis), is drafted entirely in relation to persons and situations outside the country of nationality. The reason for this will be examined *infra*; but this limited characterization of the problem is one reason why the Office came to have an active role in relation to receiving countries but little or no role in relation to the country of origin, especially in the first years. As I argue elsewhere, it is at the root of the unbalanced statement of the functions of a general refugee organization.

6. The right to nationality is, of course, recognized as a human right, e.g., Article 15(1) of the Universal Declaration of Human Rights.

7. Which human being is "self-sufficient"? This phrase is usually reserved by theologians for the Infinite Being. The phrase appears to have been used primarily for the donors' purpose of determining when a refugee should cease to be a financial burden to them. It scarcely needs saying that it is not a phrase that reflects the refugee's primary concern.

Aspects juridiques et économiques des problèmes posés par les réfugiés

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Les problèmes posés par les réfugiés sont compliqués et les opinions diffèrent selon le point de vue auquel on se place. Par conséquent, les opinions des pays d'origine peuvent être très différentes de celles des pays d'asile. Le cas des réfugiés hongrois en 1956 est souvent considéré comme un bon exemple de la réinstallation d'un grand nombre de réfugiés dans un bref laps de temps. Par contre, pour la Hongrie, ce fut une lourde et douloureuse perte. Ces réfugiés représentaient 2% de la population, en grande majorité des jeunes gens.

L'exemple montre l'existence de points de vue différents et la nécesssité de trouver des solutions dans un esprit de coopération globale. Dans leurs exposés, M. Coles ainsi que M. Hathaway ont démontré que les gouvernements ont agi souvent exclusivement dans leur propre intérêt, sans tenir compte des intérêts des réfugiés. Toutefois il est possible d'arriver à un compromis entre les intérêts de l'État et ceux des réfugiés et de trouver ainsi des solutions généralement acceptables.

Nous allons concentrer notre attention sur trois aspects du problème. Le premier est la définition du terme «réfugié» dans le droit international. Le second, c'est la possibilité de remanier la législation internationale afin de protéger les réfugiés d'une manière

plus efficace. Le troisième, qui est le plus important, c'est la prévention.

D'abord la définition. Bien des auteurs ont critiqué sévèrement la définition de réfugié dans la Convention de 1951. Le recours à la notion de persécution dans la définition juridique a transformé pour des raisons précises un problème qui devait être vu sous un angle humanitaire en problème politique. Offrir un asile à un réfugié pouvait être considéré comme une accusation contre le pays d'origine, notamment laisser entendre que les gens sont persécutés dans ce pays ou du moins qu'ils ont une crainte fondée d'être persécutés pour des raisons rejetées par la communauté internationale. Selon le droit international, les États n'ont pas le droit de porter un jugement sur les activités d'autres États souverains. La définition a donc compliqué les choses – la protection internationale des réfugiés. Un grand nombre d'États étaient incapables de coopérer dans un système conçu et dirigé contre eux à l'origine, ce qui a rendu plus difficile la solution considérée comme la meilleure, notamment la réinstallation des réfugiés dans leur pays d'origine après un certain temps. Les États ont le droit d'accorder un asile et une aide humanitaire a des personnes cherchant refuge sur leur territoire sans se référer au critère de leur persécution.

Les événements récents ont démontré que la définition critiquée est inapplicable dans plusieurs coins du monde. Il est impossible de vérifier si les millions de réfugiés en provenance des pays du tiers monde ont une crainte bien fondée d'une persécution politique, ou s'il s'agit d'une fuite devant des situations intolérables comme la sécheresse, la famine, un conflit armé ou une guerre civile.

On a suggéré de chercher une solution à ces problèmes en élaborant une nouvelle convention. Une nouvelle formule permettrait peut-être la participation de certains États pour qui la coopération était impossible pour les motifs exposés ci-dessus. Les événements qui se sont produits au cours de la dernière décennie nous incitent toutefois à une prudence extrême. La législation internationale est devenue très compliquée à cause du nombre de participants et des difficultés inhérentes à la formulation des textes. Les conditions qui semblent initialement favorables à une nouvelle législation risquent de se détériorer au cours des longues et laborieuses négociations. La troisième conférence des Nations Unies sur le droit de la mer, qui était peut-être la plus grande entreprise dans le domaine de la législation internationale, s'est ouverte dans l'optimisme, mais une fois cette tâche immense presque terminée, les conditions sont devenues tellement défavorables que l'on a des doutes sérieux sur la possibilité de la mise en valeur des résultats de ce travail. Autrement dit, ce n'est pas une nouvelle convention qui importe; il faut plutôt essayer de

prévenir les situations qui font apparaître des réfugiés, sujet qui a été mis en relief d'une manière brillante par M. Coles dans son rapport.

L'existence des réfugiés est une maladie du monde. Il faut s'efforcer non seulement de soigner le malade mais aussi de faire disparaître la cause de la maladie. Dans son document, M. Rizvi a cité plusieurs facteurs qui contribuent au phénomène et au mouvement des réfugiés; il existe plusieurs autres classifications en fonction des causes, des catastrophes naturelles et des différentes formes de catastrophes causées par l'homme, qui font apparaître des réfugiés. Comme le montent ces classifications, une des causes incontestables est la violation systématique des droits de l'homme – la persécution des minorités nationales ou religieuses – mais il faut également signaler des causes comme la guerre civile, les tensions internes et les conflits armés internationaux. En ce qui concerne ces dernières, il faut certainement partager la responsabilité parmi plusieurs pays.

Il convient par conséquent d'insister sur la nécessité de chercher des solutions économiques. Avec les sommes d'argent servant à aider les milliers de réfugiés, on pourrait éviter de grands mouvements causés par les famines. En augmentant l'aide économique aux pays en voie de développement, on pourrait contrer les effets négatifs des catastrophes naturelles qui débouchent souvent sur l'instabilité politique et les guerres civiles. Les pays devenus riches au détriment des pauvres pourraient faire bon usage de leurs richesses en accordant une aide économique accrue aux pays en voie de développement. La prévention doit commencer à ce stade primaire bien avant l'apparition de grosses vagues de réfugiés.

Certains pourraient dire, que ces considérations débordent du cadre traditionnel des droits des réfugiés, mais il est nécessaire de ne pas se borner à parler des quotas ou de la nécessité de certaines modifications législatives. En faisant preuve de plus d'audace, on pourrait faire disparaître les obstacles à la liberté de mouvement que M. Coles considère comme le coeur du problème, avec plus de bonne volonté on trouvera certainement les moyens de donner un nouveau foyer aux réfugiés dans les pays développés. Avec la même audace et la même volonté on devrait aussi aider les pays en voie de développement et les pays pauvres à maîtriser leurs problèmes économiques et sociaux, à empêcher l'apparition de véritables exodes. Je ne pense pas qu'il soit naïf ou utopique de croire à un monde où la liberté de mouvement des gens soit une réalité.

Discussion

The principal focus of discussion following this session was the contention made by Gervase Coles, in the presentation of his paper, that freedom of movement between countries was the major problem to be addressed. It was argued that lack of freedom of movement lay at the basis of the refugee dilemma and that without such freedom there would be no way that an international community could be created.

However, the importance of this issue was disputed on a number of grounds. The first difficulty, according to one speaker, lies in approaching the solution of refugees' problems from an abstract, universal basis of fundamental root causes. The causes that are revealed may be important, but they are causes that realistically are very difficult to solve at present. It would be better to adopt a more practical approach and concentrate attention on the problems that can be controlled or attacked incrementally by means currently available.

The second difficulty for a number of speakers was that freedom of movement may not be the only difficulty lying in the way of a solution. Thus, it was suggested that simply concentrating on the issue of movement and allowing people to find their own solutions within that framework will not work. The willingness to solve political problems that have led to refugee-producing situations and the right to earn a livelihood are but two examples of the many

intervening factors that have to be considered. Thus, it was argued that it is important to look for solutions that affect the processes involved and not simply to seek neutral or abstract humanitarian definitions that will not allow the problems to be dealt with in a concrete fashion.

A third difficulty concerned current reactions to forms of freedom of movement because these did not seem to bode well for the future. Thus, one speaker observed that when refugees were able to take their future into their own hands and arrive spontaneously on the borders of another country, they were telling the international community what they believed should be the solution to their problem. Yet that community is tending to blame refugees for this action, for not accepting the solutions that the international community thinks is best for them. Indeed, in October 1987 at Geneva, some UNHCR official statements referred to refugees who do not accept the solutions found for them. As a result, such refugees are being blamed by the international community for disturbing order. Yet, because the solutions being suggested include forms of voluntary repatriation, which in certain circumstances do not turn out to be as voluntary as some states would wish to argue, many refugees – and those who help them – are genuinely disturbed that such solutions (ideal as they seem in theory) will be forced upon their groups.

The response was made that mass coerced movement undoubtedly does create fear in receiving communities and that dictating a solution is not the answer; indeed, true freedom of movement by its very nature cannot require such steps because it is that freedom that provides the solution. In many ways, the 1951 Convention is part of the problem because it does not adequately state what the problem of freedom of movement is and because, in providing the means to embrace refugees, it also provides the means for rejecting individuals: it is a two-edged sword.

A number of other issues were also raised. Thus, it was observed that solutions had to be non-discriminatory. With the exception of the boat people, in the last 30 years, 83 per cent of refugees entering Canada have been from Europe, notwithstanding the fact that the bulk of the world's refugees are in the Third World. Canada's policy it was argued, has been an unfair policy, biased on the basis of ideology, race and cultural identity. Canada has focused on the cream of the crop – refugees with technological, economic or labour market advantages – and has ignored those in dire need. Thus, it was argued, some of the Honduran asylum-seekers recently rejected by Canada are now dead. The solution must be for NGOs to put pressure on their governments to change their policies to ones that are more open and humanitarian.

Turning to the cases of specific countries, one speaker questioned whether the provision of food aid was an ideal solution in situations such as Ethiopia, where authoritarian governments are in power. It was agreed that this was a difficult issue. Food aid does not always reach those who need it in such circumstances; yet there is a clear case to be made for emergency aid to prevent starvation. Another speaker suggested that an obvious means of reducing refugee numbers was to urge the removal of apartheid in South Africa; otherwise there will surely be a large refugee problem to be dealt with in that region in the future.

In concluding the discussion, several speakers suggested that wider issues such as the concept of the state and sovereignty need attention and that countries must be far more active in the task of pursuing peace. This would reduce the number of situations producing refugees and reduce the terrible human suffering that is the reality of the refugees' situation.

VI.

Canada and Refugees: A Case Study

Canada's Refugee Policy

The Honourable Gerry Weiner, P.C., M.P.
Minister of State for Immigration
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I want to say how very pleased I am to participate in this conference. Of course, as Minister of State for Immigration, I welcome this opportunity to speak to and with so many of the world's foremost authorities on refugee issues. But, as a native Montrealer, a second-generation Canadian, I am also happy to share with you my city, a dynamic, thriving, cosmopolitan meeting place of many peoples from many different ethnic, cultural, religious *and* political backgrounds. Not a few of them have been or still are refugees, from Eastern Europe, from the Middle East and from the Far East, from Africa and from the Americas, Ugandan Asians, Salvadoreans, Hungarians, Iranians, Vietnamese and Cambodians and so many more. But they share one thing. Canada is now their home, this *is* safe haven. They can get on with their lives, establish new roots, as much as possible, put the horrors behind them.

If Canada today sees the refugee as more than a problem to be solved one way or the other, it was not always so. It is one of the enduring myths of this country that this land of immigrants has always been, because of that, a land of sanctuary. It is not so. Some claim that the United Empire Loyalists who largely founded the provinces of Nova Scotia and Ontario were refugees fleeing out of personal convictions. Loyalty to the Crown, perhaps, but in few cases, was it fleeing. Many only left the American colonies after the fighting

was done, when land prices were restored and what they gave up was more than compensated for in grants of tens and hundreds of thousands of hectares of virgin territory.

The myth of Canada, the land of the refugee, likes to look for examples towards the Doukhobors and Mennonites, and so many others who may have come to Canada because they sought religious freedom. But Canada took them because the supply of stalwart peasants from Western Europe seemed to be exhausted; and those huge empty spaces we call the Prairies demanded to be filled. In the 1930s, Canada did have an opportunity to act out of pure humanity, to open its arms and hearts to those fleeing before the common storm. These were the real thing, refugees in every sense of the word, there could be no doubt or misunderstanding about their predicament or their need. As Professor Abella has pointed out, Mexico and Colombia took some 40,000 of these refugees between them; China, some 25,000; Argentina and Brazil over 25,000 each; Great Britain, 85,000; the United States, 240,000. Canada accepted just 4,000 refugees.

Today, Canada is the proud holder of Nansen Medal and an acknowledged leader in the international response to this phenomenon of the twentieth century. The failing of other generations are behind us. But, we forget them at our peril. To accept the myth of Canada's great refugee tradition is to wrap ourselves in a blanket of smug self-righteousness which is patently false, and which, if allowed, will blind us to our true responsibilities and obligations. Even Canada's record since the Second World War may be questioned. Yes, we have accepted over half a million refugees in those 42 years, but let us not forget that many of the displaced persons were conveniently cheap labour, and were seen as such, by their Canadian hosts to whom they were assigned. Nor let us be blind to the fact that, by being first out of the blocks during the Hungarian uprising, Canada had first choice of those waiting for resettlement. And similar considerations have been seen to be present in our response to Czechoslovakians in 1968, and Ugandan Asians in 1972. It is true we welcomed tens of thousands of men, women and children who needed our help, but we were not unaware that, as a body, these people were highly skilled and highly trained. An undoubted asset to the growth and development of a country such as Canada.

It is a matter of public record that Canada, early and so long a forceful proponent of the IRO and the UNHCR did not itself sign the Geneva Protocols until 1969. Our delay was entirely on the issue of our continued sovereignty to exercise our own choice in whom we would and would not accept. As recently as 1973, Canada had yet to make the pledge to help all genuine refugees who seek and need that help. When put to the test, with the overthrow of the Allende government in Chile, Canada found that, although it accepted several

thousand political refugees, it also rejected many others whom it considered too "political".

In fact, it was not until the new Immigration Act of 1978 that Canada could point with security to such principles—less than a decade ago. And it was not until the Clark government's unprecedented response to the plight of the Vietnamese boat-people, that Canada could truly claim to have acted with unqualified generosity. That one incident really created Canada's policy towards refugees which is today so acknowledged. And not only did it lead to our acceptance of refugees from all of South-East Asia, who have now totalled well over 100,000, it led us to recognize that refugee policy is not simply a matter of opening doors and the passing out of travel documents. It is a complex process which, to be successful both for the claimant and the host country, requires a commitment on the part of the whole society, and a commitment beyond the policy itself.

As much as we delineate refugee policy from other policies, it is increasingly difficult to do so. A country with the most generous refugee policy in the world has little claim to moral rectitude if, at the same time, it is an indiscriminate purveyor of the arms and weapons which create the refugee in the first place. And conversely, a nation which takes no refugees, but effectively delivers development aid to the Third World, may actually be doing more to eliminate the conditions which give rise to refugees than most of us.

Canada has undertaken other initiatives which are beyond refugee policy per se, but nevertheless impact on refugees. This year, Canada was host to two major world organizations, or families of nations, La Francophonie and the Commonwealth. Many newspapers in Canada questioned why we should welcome and entertain so many dictators and tyrants. We believe the opportunities afforded by our role in such groups far outweigh the criticisms. And we believe that by working through La Francophonie and the Commonwealth, we can effectively contribute towards the eventual elimination of root causes of refugees. For example, one agreement reached at those meetings establishes a distance-learning network which will reach many of the poorest and least developed countries in the world.

From coordinating centres in Canada, we will bring new resources to the fight against disease and famine. We will help train the people needed to effectively manage an emerging economy. This, too, is refugee policy? As is the almost $2.2 billion given in the last fiscal year in official development aid, through CIDA, or the $319 million given in the same period to agencies of the United Nations and other international organizations; everything from the International Rice Research Institute, in Burma, to U.N. emergency operations in Africa. If we limit it only to actual international relief agencies, Canada's financial contribution ranks fifth in the world, but our

aggregate contributions to international relief are second only to the United States.

Let us not fool ourselves. If we are ever to eliminate the phenomenon of the refugee it will be through actions such as these, not through policies on first asylum or resettlement. It is the basic needs of mankind or, rather the lack of them, which create instability and ideological conflict and war. But until such time, individual nations will continue to struggle with the fact of the refugee, and struggle it is. Because when you strip all the niceties and the myths away, you are left with some very hard decisions to make.

Canada is emerging from such a time of decision. As you are all well aware, we have in the process developed and are now in the final stages of passing into law, a new refugee determination system. You are also all probably aware, and if you are not you soon will be, that this new system has been severely criticized and challenged. And it continues to be: despite an exhaustive legislative process which, through many dozens of hours of debate and public hearings, has led to a number of important amendments and improvements. But the principles of Bill C-55 and, indirectly, Bill C-84, remain. Canada had to make a decision. Were we going to help the genuine refugee or not? Through mismanagement, benign neglect, myopia, Canada's refugee determination system had become a travesty of what it was intended to be. Those whom it was established to help, genuine refugees with a claim to Canada's protection, could not be helped. Claimants were, and still are waiting three, four and even five years before final determination; years of doubt and the constant threat of deportation. But the same process which was denying haven to legitimate claimants was effectively granting it to tens of thousands of false claimants. Economic migrants, would-be immigrants tired of waiting in line or knowing they would not qualify for admission to Canada. By making the claim to be refugees, they were automatically accorded the right to remain and work in Canada. They had the same three, four and five years to wait for determination. Years to establish roots, perhaps to marry, perhaps have children, to lay a successful claim for permission to remain on humanitarian and compassionate grounds, if an amnesty or administrative review did not grant them that right in the interim.

Today we have some 44,000 refugee claimants somewhere in the process. Without the controls we were forced to introduce earlier this year, the number would be still higher. In the first six weeks of this year, before those controls, claimants were arriving at a rate of 1,500 per week. Each week, claims for refugee status were being made at a pace almost equal to the total annual rate of just six or seven years ago. Many, perhaps most, are not genuine refugees. Studies of recent claimants suggest that perhaps as many as 70% either are simply not

refugees or already have the protection of another country. The new system is designed to help and assist the legitimate refugee who has no prior protection, nor has had the opportunity to acquire such protection. The refugee who meets those two criteria, will be afforded safe haven in Canada, *every* such refugee without limit.

The claimant to that protection will be assessed by a process which I believe, for fairness, for speed and for safety, has no equal. Now I do not want to review the mechanics of the system. They are on record and, I have no doubt, they will be examined once more by our panel. But I should like to point out just a few details, each of them a reason to support the contention that this is indeed a quality determination system.

For one, every claimant will have the opportunity to present reasons why his or her claim should be heard. The claimant will plead his case before a refugee board member and an adjudicator. Bill C-55 now specifically states that the evidence to support a claim is in no way restricted and each claimant has the right to testify on his or her behalf. It spells out exactly what is meant by "Passing through" a country while on the way to Canada. It also states clearly that individuals in transit through the territory of another signatory state are not affected by the safe third country rule. The Bill defines what is meant by a safe third country – for instance – that such a country complies with *non-refoulement* in accordance with the Geneva Convention. Every claimant will be entitled to legal representation, at government expense if need be. Every claimant is entitled, if so wished, to the presence at his or her hearing of a representative of the UNHCR. A claimant arriving from a country other than his or her homeland, and who fails to win approval to remain in Canada, will not arbitrarily be returned to that third country. And, any third country to which the claimant is returned *must* comply with the Geneva Convention on *non-refoulement*.

By reducing the process from years, to months and even weeks, we also provide an incentive not to abuse the new system. Nor will we permit abuse by those suspected of war crimes. They will not be allowed to use provisions designed to provide safeguards for the genuine refugee against error or oversight, as a means to delay their removal or prosecution.

And through Bill C-84, we will end the deception of gullible would-be migrants by crooked consultants and unscrupulous travel agents; and we will end the traffic in human misery which sometimes goes hand in glove with it. We will not tolerate abuse, either within the system or without, because to do so is to deny protection to those who need it and to undermine this country's long-standing immigration policy itself. We are only too aware of public attitudes and opinions. We will *not* jeopardize Canada's openness through

complacency or inefficiency. We have seen the growth of modern-day xenophobia, if not racism, in the most cosmopolitan of Western societies. I find the philosophy of Jean-Marie Le Pen an anathema. But I do not pretend for one moment that xenophobia does not exist here in Canada, and the perception that both our refugee and immigration policies are open to widespread abuse will fuel those fears. This, we simply will not allow. Refugee policy is for refugees. And within the policy, the person who claims refugee status from Canada, must merit it. This must be clearly understood. Canada's determination system has but one purpose. To distinguish the genuine refugee in need of Canada's help from all other claimants. That distinction made, we will help the genuine refugee to resettle in Canada as quickly as possible.

As I said earlier, it is not enough to just open doors and then leave the refugee on his or her own. Canada's refugee policy is therefore more than simply a question of admissibility. This year, the government of Canada will spend $115 million for refugee resettlement and language training alone. This takes no account of literally of dozens of other government services, federal, provincial and municipal, and services of volunteer agencies which will also be provided. It is important to recognize that the successful integration of the refugee into society is dependent upon the resources and goodwill of that society. Perhaps especially so in a country such as Canada, as vast and climatically forbidding as it is. This year, the government itself will bring to Canada some 12,000 refugees in this manner, and next year 13,000. Private sponsors will probably bring in another 6,000, although it could be higher or lower. There is no limit whatever to private sponsorship.

Given the continuing conflict in Central America, and the special concern of many Canadian groups in directly aiding the victims of that conflict, I think we may well see some increase in private sponsorship. Indeed, concern over that conflict is the reason the government of Canada itself includes Salvadoreans and Guatemalans within its Designated Class—people who would be refugees under the Convention, except they have not yet left their countries.

Be it in programs such as the Designated Class, in resettlement assistance, in international relief and development aid, or in the justice and fairness of our determination system, I am prepared to put Canada's response to the refugee in this year 1987 up against that of any nation.

But is Canada's and other nations' response adequate to the challenge we face today? Recall President Carter's *Global 2000 Report*, commissioned over a decade ago already, which stated:

> For hundreds of millions of the desperately poor the outlook for food and other necessities will be no better. For many it will be worse. Barring revolutionary advances in technology, life for most people on Earth will be more precarious in 2000 than it is now – unless the nations of the world act decisively to alter current trends.

Well, technology is advancing at a revolutionary pace. There is no doubt about it. And despite the massive relief effort in Ethiopia just three and four years ago, the people of that sad country face massive famine again. It's not only that there's no rain and the crop has failed. It's that the relief mechanisms we devised just a short time ago are not able to respond. It's that we failed to end the civil war.

I have spoken about myths today. Perhaps the greatest myth is that *any of us* really have the resolve to achieve that decisive action called for by the *Global 2000 Report*, and let's be honest about it, called for by any number of other reports and studies and commissions. Today, we are worrying about the fate of 10 or 15 million refugees in this world. And each of us is preoccupied by what we can do and how we can do it. Our priorities and criteria and systems. I will tell you frankly, if we cannot begin to solve this problem on a global scale, this problem we all claim is so fundamentally important to our social and human values, then we do not stand a snowball's chance in hell of solving the rest of it. Can we solve it? Can we solve just the problem of the refugee? Or are we simply fooling ourselves, going through the motions? I know this much. We cannot divorce the refugee problem from the greater problems of peace and poverty, social and economic development, the environment, health. Everything is linked. And we have been working on them as an international community since the League of Nations, and we have failed at that since the League of Nations. We better start getting it right, we better start blowing away *all* our myths.

I have spoken today about Canada's policy toward refugees. It is important. Today, it is important to us, to the world; tomorrow, it will probably be of complete insignificance. I hope to God I am wrong, but if I and so many others are not, then we are simply fooling ourselves if we believe any of our individual responses are sufficient or that they will isolate us from the coming storm. If we had the option in the past of working alone or together, we do not have it now. We *must* cooperate. We must put both our heads and our hearts together as never before. The one thing that gives me hope, is that I really *do* think that we *do* want to do it. Each nation represented here in some way, is making more than the nominal commitment. Despite budget

deficits and national debts, we are contributing our moneys and our abilities to the problems of the world. We *do have* the good will.

But now, as never before, we must also have the political will. I know that I speak for the Prime Minister and the government of Canada when I say Canada will show that will. I, and my department, just one small part of that Government, will work with our neighbours and allies at any time and at any place to find the solutions we desperately need. And perhaps, just perhaps, that is the greatest commitment of all we can make to the world's refugees and all of us.

La politique canadienne en matière de réfugiés

L'honorable Gerry Weiner, C.P., député
Ministre d'État à l'Immigration
Canada

J'aimerais d'abord vous dire combien il me fait plaisir de participer à cette conférence. Il va sans dire qu'en ma qualité de ministre d'État à l'Immigration, je me réjouis de pouvoir m'adresser à une pléiade des plus imminentes autorités du monde sur la question des réfugiés. Mais c'est aussi en tant que Montréalais et Canadien de deuxième génération que je suis heureux de partager avec vous ma ville, une métropole dynamique, florissante et cosmopolite qui forme le point de rencontre de nombreux peuples issus de contextes ethniques, culturels, religieux *et* politiques différents. Nombre de mes concitoyens ont été ou sont encore des réfugiés. D'Europe de l'Est. Du Moyen ou de l'Extrême-Orient. De l'Afrique et des Amériques. Des Asiatiques ougandais, des Salvadoriens, des Hongrois, des Iraniens, des Vietnamiens, des Cambodgiens et tant d'autres. Ils ont un point commun. Le Canada est leur patrie. *C'est* un havre où ils peuvent désormais mener une nouvelle existence, s'enraciner et, autant que possible, effacer de leur mémoire les horreurs qu'ils ont connues.

Si aujourd'hui le Canada voit les réfugiés comme plus qu'un problème auquel il faut remédier coûte que coûte, il n'en a pas toujours été ainsi. Un des mythes persistants de ce pays veut que cette nation d'immigrants soit, de ce fait, une terre d'asile. Il n'en est rien. Certains prétendent que les loyalistes de l'Empire-Uni, auxquels nous devons en grande partie la fondation des provinces de Nouvelle-Écosse

et d'Ontario, étaient des réfugiés que leurs convictions personnelles ont poussé à fuir. Par loyauté envers la Couronne peut-être. Mais il s'agissait rarement de fuite. Plusieurs n'ont quitté les colonies américaines qu'à la fin des combats, au moment où les prix des terres ont été rétablis. Et les dizaines et les centaines d'hectares de territoire vierge qu'ils se sont vus concéder les ont largement dédommagés de tout ce à quoi ils avaient renoncé.

Le mythe qui fait du Canada une nation de réfugiés aime à s'alimenter en exemples comme les Doukhobors et les Mennonites qui sont peut-être venus au Canada en quête de liberté de croyance. Mais si le Canada les a accueillis, c'est parce que ses ressources en vaillants paysans venus d'Europe de l'Est semblaient épuisées; et que ces vastes étendues désertes connues sous le nom de Prairies devaient être peuplées. Les années 1930 ont, il est vrai, fourni au Canada une occasion d'agir par pure humanité. D'accueillir à bras ouverts ceux qui avaient choisi de s'enfuir avant que la tempête ne se lève. Nous avions alors affaire à d'authentiques réfugiés, des réfugiés au sens propre du terme. Nul n'aurait pu se méprendre sur leur compte ou douter du malheur qui les affligeait, de leur misère. Comme l'a signalé le professeur Abella, le Mexique et la Colombie se sont partagés près de 40 000 réfugiés, la Chine en a accueilli quelque 25 000; l'Argentine et le Brésil, plus de 25 000 chacun. La Grande-Bretagne, 85 000. Les États-Unis, 240 000. Le Canada n'a ouvert ses portes qu'à 4 000 réfugiés.

Le Canada s'est montré digne d'être honoré de la médaille Nansen et aujourd'hui, il est le chef de file incontesté du mouvement international de réaction à ce phénomène du vingtième siècle. Les échecs que d'autres générations ont essuyés appartiennent au passé. Mais c'est à notre péril que nous les oublions. En acceptant le mythe qui confère au Canada une longue tradition en ce qui trait aux réfugiés, nous nous targuerions d'une dignité présomptueuse et manifestement fausse. Si nous nous laissons aller à pareille attitude, elle ne fera que nous empêcher de voir nos véritables responsabilités et obligations. Il y a peut-être même lieu de remettre en question les annales canadiennes qui ont suivi la Seconde Guerre mondiale. Nous avons, en effet, pris sous notre aile plus d'un demi-million de réfugiés pendant ces quarante-deux années. Mais n'oublions pas que quantité de ces personnes déplacées formaient une main-d'oeuvre exploitée et plutôt commode. C'est d'ailleurs sous cet angle que les Canadiens que l'on avait désignés pour les accueillir les considéraient. Nous ne devons pas non plus fermer les yeux sur le fait que le Canada, à l'époque de l'insurrection hongroise, a été le premier à réagir et est ainsi apparu comme un endroit de prédilection pour tous ceux en quête d'une nouvelle patrie. Ce sont des considérations analogues qui ont amené des Tchécoslovaques en 1968, et des Asiatiques ougandais

en 1972, à élire domicile dans notre pays. Nous ne pouvons nier avoir accueilli des dizaines de milliers d'hommes, de femmes et d'enfants en détresse. Mais nous n'étions pas sans savoir que toutes ces personnes, de par leur formation et leurs compétences supérieures à la moyenne, représentaient un atout incontestable pour la croissance et le développement d'un pays comme le Canada.

Il est établi que le Canada, promoteur convaincu de longue date de l'OIR et du HCR, n'a lui-même adhéré aux Protocoles de Genève qu'en 1969. Le caractère quelque peu tardif de notre signature reposait entièrement sur notre souci de pouvoir continuer d'exercer notre souveraineté au moment de décider qui accueillir et qui refuser. Pas plus tard qu'en 1973, on a demandé au Canada de s'engager à offrir son aide à tous les réfugiés qui la recherchaient et la méritaient véritablement. La chute du gouvernement chilien d'Allende a soumis le Canada à une épreuve qui lui a fait prendre conscience du fait que s'il avait ouvert ses portes à quelques milliers de réfugiés politiques, il les avait aussi fermées à beaucoup d'autres qu'il jugeait trop "politiques".

En fait, ce n'est qu'à partir de la loi de 1978 sur l'immigration que le Canada a pu se déclarer disposé à respecter pareils principes. Il y a de cela moins d'une décennie. Et ce n'est qu'avec l'avènement de l'administration Clark et sa réaction sans précédent à la triste situation des réfugiés de la mer vietnamiens qu'il a pu se féliciter à juste titre d'avoir posé un geste d'une générosité inégalable. C'est à cet événement en particulier que nous devons la politique canadienne en matière de réfugiés qui, aujourd'hui, est unanimement reconnue. Ce même événement a fait bien plus que nous amener à accueillir des réfugiés des quatre coins de l'Asie du sud-est, maintenant au nombre de 100 000, et même davantage. Il nous a sensibilisés au fait qu'une politique en matière de réfugiés ne se borne pas à ouvrir les portes d'un pays et à délivrer des titres de voyage. Il s'agit d'un processus complexe dont la réussite, tant pour le revendicateur du statut de réfugié que pour le pays d'accueil, dépend de l'engagement de la société dans son ensemble. Un engagement qui va plus loin que la politique en soi. Nous essayons autant que possible d'empêcher la politique relative aux réfugiés et les autres politiques de se chevaucher, chose qui semble de plus en plus difficile. Un pays ne peut à la fois prétendre à la rectitude morale et distribuer à tort et à travers des armes qui sont souvent le point de départ du problème des réfugiés. Inversement, un pays qui n'accepte aucun réfugié, mais qui en revanche, contribue de façon efficace au développement du Tiers-Monde, concourt sans doute davantage à l'élimination des conditions qui sont à la base du problème que nous ne le faisons.

Le Canada a entrepris d'autres initiatives qui dépassent la politique sur les réfugiés en soi, ce qui ne les empêche pas d'avoir une

certaine incidence sur eux. Cette année, le Canada a accueilli deux organismes d'envergure, ou familles de pays, la Francophonie et le Commonwealth. Quantité de journaux du pays se sont interrogés sur les motifs qui poussaient le Canada à recevoir un si grand nombre de dictateurs et de tyrans. Nous sommes d'avis que le rôle que nous jouons au sein d'organisations de ce type nous offre des occasions qui suffisent à noyer les critiques. En effet, nous croyons qu'en travaillant de pair avec la Francophonie et le Commonwealth, nous pouvons contribuer efficacement à enrayer les causes profondes du phénomène des réfugiés. Par exemple, une entente convenue lors de ces réunions établit un réseau d'éducation à distance qui se ramifie vers les pays les plus pauvres et les moins développés de la planète.

A partir de centres de coordination situés au Canada, nous multiplierons les ressources affectées à la lutte contre la maladie et la famine. Nous contribuerons à la formation des personnes dont la gestion efficace de l'économie naissante dépend. Est-ce là une politique en matière de réfugiés? Comme la somme de près de 2,2 milliards de dollars versée, au cours du dernier exercice, en aide officielle au développement, par le biais de l'ACDI. Ou encore les 319 millions accordés au cours de la même période à des organisations internationales et à d'autres relevant des Nations Unies; et ne négligeons pas l'Institut international de recherches sur le riz, en Birmanie, ni les interventions d'urgence des Nations Unies en Afrique. Si nous limitons strictement notre perspective aux organismes de secours international, la contribution financière apportée par le Canada se classe cinquième au monde. Notre contribution globale à l'aide internationale, en revanche, occupe la deuxième place, après les États-Unis. Ne nous leurrons pas. Si nous aspirons à la disparition du phénomène des réfugiés, il faut savoir qu'elle ne s'opérera qu'au moyen d'actions de ce type, et que les politiques qui se rattachent aux pays de premier asile ou à la réinstallation ne suffisent pas. Ce sont les besoins essentiels de l'humanité ou, plus exactement, leur absence, qui inspire l'instabilité, les conflits idéologiques et les guerres. En attendant ce jour, chaque nation va persévérer dans sa lutte contre la réalité des réfugiés. Et c'est bien d'une lutte qu'il s'agit. Car une fois que l'on fait abstraction de toutes les fioritures et des mythes, on se trouve confronté à des décisions difficiles.

Le Canada sort d'ailleurs tout juste d'une période consacrée aux prises de décisions. Vous n'ignorez sans doute pas qu'au cours de ce processus, nous avons mis au point un nouveau système de reconnaissance du statut de réfugié qui devrait avoir force de loi sous peu. De plus, vous êtes sans doute conscients, ou le deviendrez d'ici peu, de ce que notre système a été, et demeure, la cible de critiques virulentes doublées de contestation. Et ce, en dépit des douzaines

d'heures de débat et d'audiences publiques qui ont conduit à plusieurs modifications et améliorations non dépourvues d'importance.

Mais les principes propres au projet de loi C-55, et, indirectement, au projet de loi C-84 demeurent. Le Canada doit prendre une décision: compte-t-il, oui ou non, apporter son aide aux véritables réfugiés? A force de mauvaise gestion, de négligences anodines et de manque de vision, l'essence du système canadien de reconnaissance du statut de réfugié a subi une déviation. Ceux à qui l'aide du Canada était destinée, les réfugiés authentiques revendiquant sa protection, n'ont pu en bénéficier. Les revendicateurs du statut ont attendu, et attendent encore, trois, quatre, voire cinq années avant la décision finale. Des années à vivre dans l'incertitude, avec la menace omniprésente d'expulsion. Et tandis qu'on refusait l'asile aux revendicateurs légitimes, des dizaines de milliers de prétendus réfugiés s'en prévalaient. Il s'agissait en vérité de migrants économiques, des aspirants immigrants qui étaient las de faire la queue ou qui savaient pertinemment qu'ils n'étaient pas admissibles à l'entrée au Canada. Dès le moment où ils demandaient à être réfugiés, on leur accordait automatiquement le droit de rester au Canada et d'y travailler. Eux aussi devaient attendre trois, quatre ou cinq ans avant la détermination de leur statut. Des années au cours desquelles il leur était possible de s'établir, d'éventuellement se marier et fonder une famille. En somme, ils réunissaient tous les éléments qui leur permettraient de demander, et d'obtenir, de rester pour des raisons d'ordre humanitaire, dans le cas où une amnistie ou une revue administrative auraient échoué à leur octroyer ce droit.

Aujourd'hui, le Canada compte quelque 44 000 demandeurs du statut de réfugié, qui en sont plus ou moins loin dans le processus de détermination. Sans les contrôles que nous avons été contraints de mettre en place cette année, ce chiffre serait beaucoup plus élevé. Pendant les six premières semaines de l'année, qui ont précédé les mesures de contrôle, les revendicateurs arrivaient à un rythme de 1500 par semaine. Le nombre hebdomadaire de revendications du statut de réfugié atteignait des proportions proches de celles que l'on avait connu annuellement voilà à peine six ou sept ans. Plusieurs, voire la majorité, d'entre eux ne sont pas d'authentiques réfugiés. Des études portant sur de récents revendicateurs du statut indiquent qu'il se peut que jusqu'à 70% de ces derniers ne soient tout bonnement pas des réfugiés ou bénéficient déjà de la protection d'un autre pays. Le nouveau système est conçu en vue de venir en aide et porter secours aux réfugiés légitimes qui, dès le départ, ne bénéficient d'aucune autre protection et n'ont pas eu l'occasion de s'en doter. Ceux qui satisfont à ces deux critères auront droit d'asile au Canada. Cela comprend *tous* les réfugiés, sans exception.

Le revendicateur de pareille protection verra sa demande examinée en vertu d'un processus qui, à mon humble avis, sous un rapport d'équité, de célérité et de sûreté, est incomparable. Loin de moi l'intention de réétudier les mécanismes du système. Ils sont établis et, je n'en doute pas, nos experts en pèseront à nouveau le pour et le contre en l'espace de quelques minutes. J'aimerais néanmoins souligner quelques détails, chacun étant susceptible de corroborer la qualité de ce système de détermination.

Chaque revendicateur aura, pour sa part, l'occasion d'invoquer les raisons pour lesquelles sa revendication mérite d'être entendue. Il pourra alors plaider sa cause en présence d'un membre de la Commision du statut de réfugié et d'un arbitre. Le projet de loi C-55 stipule clairement qu'aucune limite ne s'applique aux preuves pouvant appuyer la revendication et que tout revendicateur a le droit de témoigner en son propre nom. Il énonce sans équivoque ce que l'on entend par transiter un pays lorsqu'on se dirige vers le Canada. Il énonce clairement, en outre, que les personnes en transit sur le territoire d'un autre État signataire ne sont pas touchées par la règle du pays tiers hors de danger. Le projet de loi donne une définition du pays tiers hors de danger, laquelle dit, notamment, que pareil pays doit être conforme au non-refoulement, en vertu de la Convention de Genève. Tout revendicateur aura le droit d'être juridiquement représenté, aux frais du gouvernement si besoin est. Tout revendicateur a droit, s'il le désire, à la présence d'un représentant du HCR à son audience. Un revendicateur en provenance d'une nation autre que son pays d'origine et qui se voit refuser le droit de rester au Canada, ne sera pas arbitrairement renvoyé dans ce pays tiers. Aussi, tout pays tiers où l'on renvoie le revendicateur doit respecter la Convention de Genève eu égard au non-refoulement.

En ramenant un processus qui durait des années à des mois, et même des semaines, nous incitons ceux qui seraient tentés d'abuser de notre système à ne pas le faire. Nous ne tolérerons pas non plus les abus des personnes soupçonnées d'avoir commis des crimes de guerre. On ne leur permettra pas d'avoir recours aux clauses dont le but est de protéger les réfugiés contre les erreurs et les négligences éventuelles, pour retarder leur renvoi ou les poursuites qui pourraient être intentées.

Et par l'entremise du projet de loi C-84, nous mettrons un terme au phénomène des consultants et agents de voyage malhonnêtes qui dupent les aspirants immigrants crédules; nous supprimerons par la même occasion le trafic de misère humaine avec lequel il va parfois de pair. Nous ne tolérerons les abus sous aucun prétexte, que ce soit à l'intérieur ou à l'extérieur des limites du système, car agir autrement serait refuser notre aide à ceux qui en ont besoin; et saper la politique de longue date du Canada en ce qui a trait à l'immigration. Nous ne

sommes que trop conscients des opinions et des attitudes du public. En aucun cas nous ne laisserons la suffisance et l'incompétence compromettre la largeur d'esprit du Canada. Nous avons été témoins de l'ascension de la version moderne de la xénophobie, sinon du racisme, au sein d'une des sociétés occidentales le plus cosmopolites. Je vois en la philosophie de Jean-Marie LePen un anathème. Je ne prétends pas pour autant que la xénophobie soit absente au Canada. Par ailleurs, la perception selon laquelle nos politiques, s'adressant respectivement aux réfugiés et aux immigrants, sont en proie à de nombreux abus, ne font qu'alimenter ces craintes. Nous n'admettrons absolument pas les abus. Les politiques en matière de réfugiés s'adressent strictement aux réfugiés. Et dans le contexte de ces politiques, toute personne revendiquant le statut de réfugié auprès du Canada, doit en être digne. Il faut bien comprendre que le système de reconnaissance du statut de réfugié au Canada poursuit un but unique: distinguer les réfugiés véritables, ceux qui ont besoin de notre aide, de tous les autres revendicateurs. Cette distinction établie, nous serons en mesure d'aider les réfugiés authentiques à s'installer au Canada dans les plus brefs délais.

Comme je l'ai dit précédemment, ouvrir nos portes aux réfugiés pour ensuite les laisser prendre leur destin en mains ne suffit pas. Ainsi, la politique canadienne en matière de réfugiés déborde la simple question de l'admissibilité. Cette année, le gouvernement canadien affectera 115 millions de dollars à l'établissement des réfugiés et à la formation linguistique. Et cela sans compter les douzaines de services des gouvernements fédéral, provinciaux et municipaux, auxquels s'ajoutent des organismes bénévoles qui eux aussi prodigueront leur aide. Il est important de reconnaître que le succès de l'intégration des réfugiés à la société repose sur les ressources et la bonne volonté de cette dernière. Cela est peut-être plus particulièrement vrai dans un pays comme le Canada, caractérisé par l'immensité de son territoire et les obstacles climatiques qu'il présente. Ainsi cette année, le gouvernement amènera à lui seul quelque 12 000 réfugiés au Canada, et 13 000 l'année prochaine. Quant aux groupes de parrainage, ils accueilleront 6 000 autres réfugiés. Précisions que le chiffre réel pourrait être inférieur ou supérieur, car le parrainage par groupes est illimité.

Étant donné les conflits qui continuent à agiter l'Amérique centrale, et les multiples organismes canadiens qui se montrent soucieux de venir directement en aide aux victimes de ces conflits, une hausse du nombre de parrainages par groupes me semble fort probable. C'est d'ailleurs sa préoccupation à l'endroit de ces conflits qui a incité le Canada à inclure les Salvadoriens et les Guatémaltèques dans sa catégorie dite désignée, qui comprend des

personnes qui seraient des réfugiés au sens de la Convention, mais ne le sont pas du fait qu'elles n'ont pas encore quitté leur pays.

Que ce soit sur le plan de programmes tels que la catégorie désignée, du secours international et de l'aide au développement, ou encore de la justice et de l'équité propres à notre système de détermination du statut de réfugié, je suis disposé à comparer la réaction du Canada envers les réfugiés en 1987 à celle de toute autre nation, quelle qu'elle soit.

Nous pouvons nous interroger sur la pertinence de la réaction du Canada et d'autres pays par rapport au défi qui se pose actuellement à nous. Rappelons-nous du «*Global 2000 Report*» entamé il y a de cela plus d'une décennie, et présenté au président Carter; en voici un extrait:

> Pour des centaines de millions de personnes extrêmement pauvres, l'horizon, en ce qui a trait aux vivres et autres nécessités, ne semble guère s'éclaircir. Pour nombre d'entre eux, il va plutôt s'assombrir. Exception faite qui avance à pas de géant de la technologie, les conditions de vie de nombreuses personnes seront plus précaires en l'an 2000 qu'elles ne le sont actuellement—à moins que les différents pays du globe n'agissent de façon décisive pour changer le cours actuel des choses.

La technologie a fait des progrès révolutionnaires, cela ne fait aucun doute. Et en dépit des efforts colossaux déployés en Ethiopie il y a peine trois ou quatre ans, la population de ce pays mal loti est à nouveau aux prises avec la famine. L'absence de pluie et de récoltes n'est pas la seule responsable. C'est le fait que les mécanismes de secours que nous avions mis sur pied il y a quelque temps n'ont pu fonctionner. Nous avons été impuissants à faire cesser la guerre civile.

Aujourd'hui, je vous ai parlé de mythes. Le plus grand mythe réside peut-être dans le fait qu'*aucun de nous* ne puisse véritablement se résoudre à entreprendre l'action décisive que réclamait le «*Global 2000 Report*» et, disons les choses comme elles sont, que quantité d'autres rapports, études et commissions ont également préconisée. Aujourd'hui, nous nous inquiétons du sort réservé à des dizaines et des quinzaines de réfugiés du monde. Nous nous préoccupons tous de ce que nous pouvons faire, de la manière dont nous pouvons agir. Nos priorités, nos critères et nos systèmes. Permettez-moi de vous dire, en toute sincérité, que si nous ne commençons pas à résoudre ce problème dont nous disons qu'il est, à l'échelle mondiale, d'une importance fondamentale pour nos valeurs sociales et humaines, nos chances de le résoudre dans la totalité se réduisent à celles d'un condamné.

Sommes-nous à même de le résoudre? Pouvons-nous uniquement résoudre le problème des réfugiés? Ou sommes-nous en train de nous illusionner, de faire semblant. Je ne sais qu'une chose. Nous ne pouvons isoler le problème des réfugiés de réalités plus larges comme la paix et la pauvreté, le développement économique et social, l'environnement, la santé. Ces questions sont toutes liées entre elles. Les efforts que nous avons, en tant que collectivité internationale, consacrés à ces problèmes, remontent à la Société des Nations. Et les échecs par lesquels se sont soldés nos efforts remontent eux aussi à la Société des Nations. Nous aurions intérêt à commencer à bien nous y prendre. Nous aurions intérêt à détruire tous nos mythes.

Aujourd'hui, je vous ai parlé de la politique du Canada en matière de réfugiés. C'est important. Aujourd'hui, c'est important. Pour nous. Mais demain, aux yeux du monde, cette question sera sans doute complètement insignifiante. De toutes mes forces, j'espère que je fais erreur. Mais si, comme tant d'autres, j'ai raison, nous nous mettons le doigt dans l'oeil si nous croyons que des réactions individuelles seront suffisantes. Ou qu'elles nous mettront à l'abri de la tempête qui menace. Si par le passé nous étions libres de travailler seuls ou ensemble, il n'en est plus ainsi aujourd'hui. Nous *devons* coopérer. Plus que jamais, nous devons nous serrer les coudes. Au plus profond de moi-même, je garde espoir, car je suis *persuadé* de notre volonté d'agir. Tous les pays représentés ici ont pris, sous des formes diverses, des engagements qui ne sont pas que nominaux. Malgré le déficit budgétaire, malgré la dette nationale, nous allouons nos deniers et nos compétences aux problèmes que connaît le globe. Nous ne sommes *aucunement* dépourvus de bonne volonté. Mais maintenant, plus que jamais, nous devons être animés d'une volonté politique. Je sais qu'en déclarant que le Canada fera preuve de pareille volonté, je parle au nom du Premier ministre et du gouvernement du Canada. J'entends, avec mcn ministère, qui n'est qu'une infime partie de ce gouvernement, travailler de concert avec nos voisins et nos alliés, quel que soit le moment, quel que soit l'endroit, en vue de trouver ces solutions dont nous avons désespérément besoin. Et peut-être, je dis bien peut-être, que c'est là l'engagement le plus important que nous puissions prendre envers la cause des réfugiés (et envers nous-mêmes).

Discussion

The main focus of discussion following Mr. Weiner's address was the contention – made by several speakers – that the legislation proposed in Bills C-55 and C-84 does not meet Canada's international obligations or respect the Canadian Charter of Rights and Freedoms. The minister argued, however, that the bills are in legal conformity with these requirements.

He added that the Minister of Employment and Immigration has received the advice of the Minister of Justice that the bills meet Canada's constitutional, convention and international obligations, and that the basis and details of this advice could be made available at the appropriate time.

Several other issues were raised during the course of discussion. It was argued that the proposed legislation was not representative of the will of the public, that the government had created xenophobia by its handling of the matter, and that refugee affairs could never be free of economic and immigration concerns if they continued to be handled by the Department of Employment and Immigration. Other speakers urged that more posts abroad were needed to handle refugee claims and more aid was needed to help refugees within Canada.

It was noted, in response, that the Department of Employment and Immigration buys services under the Immigrant Settlement Adaptation Program (ISAP) to accommodate, integrate and settle

refugees, refugee claimants and immigrants in Canada, but that funding is limited. The new Refugee Board, to be set up under the proposed legislation, will consist of some 250 qualified people and will practice refugee determination in an independent and objective fashion based on the criteria of credibility and eligibility laid down in the proposed legislation. It will be the new board's task to examine the claims of the 40,000 refugee claimants, a total comprising all those at various stages of the current determination system.

Finally, it was observed that the bills had been dealt with in an open, democratic and parliamentary way. They had been through a process of discussion in the House of Commons; there will be further discussion in the Senate, and other opportunities will arise. The government has therefore been fair and clear, it was argued, in its handling of this matter.

Panel of Canadian Parliamentarians

Jim Hawkes, M.P.
*Calgary West**

First, I should start by stating my bias. I believe that the sooner Bills C-84 and C-55 are in place and functioning, the better for the refugee situation in Canada, both today and in the future and, I would hope, the better for the refugee situation internationally. I believe that there is a danger that the public will to support our international obligations to Convention refugees is slowly and gradually being eroded, and without a change in the system it would collapse. Each day that we delay the change in the system brings us one day closer to that collapse of public will, and I will try to tell you why I believe that so firmly. It is necessary to understand, at least to some extent, the Canadian context. Probably the most important element of this is the reality that we are a democracy. This means there are restrictions of the rights of bureaucrats and restrictions on the rights of elected people inherent in the ballot box.

The next thing to keep in mind about Canada is that we are one of the very few nations that is out there actively recruiting immigrants. The previous government believed that immigration

* Parliamentary Secretary to the Deputy Prime Minister and member of the Progressive Conservative Party. The text is a modified version of Mr. Hawkes' speech.

should be reduced because of economic circumstances, unemployment and things of this kind. The current government has the view that immigration should be increased for exactly the same reasons. This issue hinges on the question of whether more people create a better standard of living for a country or whether fewer people might enable us to do that. There is a clear-cut philosophical difference here that occurred with the transition in government in 1984. Immigration flows in this country have already moved up from a planned level of 85,000 in 1984 to what we hope will be somewhere in the neighbourhood of 150,000 in 1988. This is a very controversial issue in this country; depending on how you ask the questions, you will find support for increased population through immigration or you will find people antagonistic to it and, in many cases, strongly so.

The next piece of context is that the Canadian media are a very potent force in the creation of public attitudes. The very competitive media market encourages the media to present the news in interesting, attention-grabbing ways, because our media are essentially there to make a profit. There is also an ethic that attempts to present both sides of the story, and I would suggest to you that those two features of our media presentation create distortion. Thus, the principle of fairness has, in this panel, allocated 15 minutes to each of three parties, and you will find that two out of the three do not like the legislation. Thus, two-thirds of the comments will be essentially negative towards the legislation. The reality of the Parliament of Canada is that the legislation is supported by three out of four elected members, but in all media presentations there is a distortion of the magnitude of opposition that comes from a very positive desire to present the news fairly and equally. It would be a mistake to believe that in Canada today there is overwhelming public support for the protection of refugees. There is a willingness, I believe, to protect refugees if the Canadian public can be persuaded that the people need protection, but the willingness equates with the demonstration of need for protection; any abuse of that takes us in another direction of public protest.

If I can tie that back to overall immigration policy, there are very few people who apply to come to Canada as immigrants that either do not have family in this country or do not have friends. Such applicants must enter an immigration queue before they come to Canada. When Canadians see other people with the same characteristics and no special need jumping the queue, then we have an erosion of public will and erosion of confidence. The longer that goes on, I suggest, the worse the world will be for refugees.

Let me give as succinct an overview as I can of the problems created by the current legislation. Until May 1986, five to seven years was the norm for decision making about whether one was or was not a

refugee. (The government then announced a "fast-track" process that in many cases reaches a decision within 18 months, but not in all cases.) What the current law does is make admission to this country universal; at our borders today, the claim that one is a refugee is sufficient to guarantee entry and about 18 months of residence (formerly it was five to seven years). The situation today, without these Bills, is that anybody gets that right. The most blatant abuse has come from 3,500 claimants from Portugal and more than 2,000 from Turkey and Brazil—countries that are not refugee-producing countries.

In Canada today, when our immigration service catches someone who is living in Canada in violation of immigration law, the loophole in the law is the claim to be a refugee. Currently 75 per cent of the people who are apprehended inside the country for the breaking of immigration law claim to be refugees, and removal now takes an average of 18 months. So we have a complete breakdown in terms of protection of the border and removal from the country because of the claim to be a refugee. I think the evidence is clear that a huge portion of those that make the claim do not need protection; their claims are not credible. Yet the legal system provides the same length of time that a true refugee would have within the determination system. The public is upset about that, and in a democracy the degree of upset becomes an important factor in terms of any government's ability to act in a manner that is too far contrary to public perception. I think we are in that situation.

The solution, I suggest to you, is that we need, first of all, a clear definition of who is entitled to the right and a definition of all of the rights that we want to accord refugees. We need clarity in the public mind on who it is to whom we offer these special rights and this special protection. Second, we need quick decisions if we are going to have a system of law in which that protection is offered to legitimate Convention refugees and abusers can be removed quickly and efficiently. In a world of increasing international terrorism there has to be a means of determining and detaining people until we know who they are before they are free to participate in Canadian society.

Working from this context to those problems, what kind of system does the combination of Bills C-84 and C-55 provide, and how does that relate to the protection offered in other countries? I suggest that the legal protections for refugees will be better under the Canadian system than in any other country that I have been able to discover. (Yet if I were to read the documents put out by the Department of Employment and Immigration and a lot of the public statements made, I do not think I could come to that conclusion.) Under our Immigration Act we have a two-part appeal process, to the Minister and to courts or appeal bodies. Under the new system, that

basic scheme is continued. When people arrive at our borders in the future, they will have an opportunity to convince an administrative officer that they should get into the country. This can be done on humanitarian and compassionate grounds, as well as the legal grounds of entitlement for visitors – visas and landed immigrant visas, and so on. When the administrative officer decides they should not be admitted to the country that decision is reviewed by a senior administrative person. Thus, there is the first level of appeal (where the claimant is not represented), but if it is agreed that the person should not be admitted, then they may appeal to an adjudicator; and, if they are making the claim to refugee status, the appeal is to a two-person panel consisting of an independent adjudicator and a separate Refugee Board member. (In our legislation, we call that an inquiry, but in international terms it is an appeal of an administrative decision.) If that decision to admit is negative, no removal can occur in anything short of 24 hours and that decision can be appealed, on leave, to the Federal Court. The taxpayers of the country provide a barrister and solicitor from the moment when the appeal of the administrative decision is made. An appeal to the Minister may go on concurrently. Internal inquiries, once people are admitted, run through roughly the same kind of a process. I hope that these points put a somewhat different twist on what the legislation is all about and why it is there.

David Berger, M.P.
*Laurier**

Mr. Weiner, Mr. Hawkes and Mr. Bouchard have all referred to the danger of a backlash. They have constantly harped on this for the past six months. But they have made no attempt whatsoever to put the matter in perspective, to compare the numbers in Canada to the situation in other countries as was done by Rabbi Plaut when he compared the situation of Canada to that of Costa Rica. It has been useful to be reminded at this conference that most refugees are not coming to Canada or to the United States, that only a small fraction of the 12 to 15 million refugees in the world are trying to make their way here. It is necessary to be reminded that settlement is an option for only a small portion of refugees and that we have to keep the larger picture in mind. It is good to be reminded that the Convention exists to give refugees the ability to effect some salvation on their own, to move spontaneously to a safe haven. That is the whole purpose of the Convention. We do not need a convention to tell refugees to line up and apply to immigrate from a visa office abroad. If we deny refugees the ability to seek a safe haven, we undermine the Convention and we undermine the protection it affords refugees. Finally, it is good to be reminded that the standards of the countries of Europe, or any other

* Liberal Party of Canada. The text is a modified version of Mr. Berger's speech.

country for that matter, are not necessarily the standard by which we should judge our own practices.

In this light, I would like to refer to the Report of the Special Joint Committee of the Senate and the House of Commons on Canada's International Relations, which reported to the House in June of 1986. In discussing Canada's refugee policy they said, "The goals of our refugee policies are consistent with our larger foreign policy objectives – namely, humanitarian assistance to disadvantaged peoples and our interest in a stable and just international order." "Canada," the Committee said, "has the capacity to play a major international role in promoting these goals [that is, assistance to disadvantaged peoples] and promoting a stable and just international order." The Committee reminded us that geography insulates us from the immediate problem of refugees. They added that we are also one of the few countries in the world with the economic and social capacity to resettle substantial numbers of refugees. They quoted approvingly George Cram of the United Church of Canada who said, "Canada has a unique ability and critically important role to play in the family of nations, to set some standards and be, in some ways, the standard setter for refugee policy areas." Incidentally, this Committee also stated that they strongly supported the government's decision to extend an oral hearing on questions of merit to all claimants.

Canadians often have difficulty establishing what sets us apart from other peoples. However, most Canadians agree that we possess a sense of fairness. We would like to point to our social programs as an example of this characteristic. We also take pride in our international image.

Lorsque les Canadiens voyagent à l'étranger, lorsque nous participons à des rencontres internationales, il nous arrive souvent d'être agréablement surpris de l'excellente réputation du Canada. Elle est fondée sur notre contribution à la collectivité internationale qui remonte à l'époque de M. Pearson, sur les efforts que nous déployons pour le maintien de la paix et sur l'importance de notre aide aux pays du tiers-monde.

We could also mention the generosity that the Canadian people has demonstrated to refugees since 1948. If Canadians today are upset by our refugee determination process, it is because the abuses they see offend their sense of fairness. The critical questions we must ask ourselves are the following: how do we ensure that our policies are fair to both our refugees and our immigrants, recognizing that we are dealing with two very different needs? How do we respect our obligations to refugees under both international and domestic law? What can we do to discourage widespread abuse so that Canadians will not feel that our immigration procedures are being bypassed? How can we be fair to Canadians who have relatives who want to

immigrate to Canada? This is an independent question that has not been the focus of our discussions here, but I mention it for completeness. Surely, Canadians have the ability and the ingenuity to devise a system that meets these complex needs.

Indeed, the proposals for reform of the refugee determination system made by Rabbi Plaut and largely adopted by an all-party parliamentary committee, which included a majority of members of the government party, show us the way to do it. Mr. Weiner said the government had to make a decision. It chose the wrong way. The right way, the proposals that were made by Rabbi Plaut, are based on the simple premise that we can do justice to refugees and discourage abuse by providing claimants with a full and fair hearing and a decision in a relatively short period of time. The current system invites abuse. It takes from two to five years from the day the claimant arrives in Canada to the date of the final decision. Illegal immigrants, who may be inclined to abuse the system, do so because they know they can stay. However, if a quick determination were made, say within four or five months of a person's arrival in Canada, it would remove abusers and allow refugees to begin to rebuild their lives quickly. In this manner, we would respond to the needs of the refugees and most abusers would not come. The cost simply would be prohibitive for someone to come here and be sent home shortly afterward. By cutting down on the time required for a decision, abuse is eliminated, and the confidence of Canadians in our system and laws would be restored.

The other half of the equation is the refugee: how can we be fair to refugees? Rabbi Plaut went to great lengths in outlining the manner in which to be fair to refugees. He insisted on the need for independence of the Refugee Board and the right to counsel. He argued that while it is necessary to shorten the process to a minimum, a certain minimum period of time is required for refugee claimants to prepare their cases adequately.

Dans son rapport, le rabbin Plaut a étudié et rejeté divers moyens visant à empêcher arbitrairement certains groupes de personnes de présenter leurs demandes. Le système de détermination du statut de réfugié doit être accessible à tous. Soit toute personne arrivant au Canada et revendiquant le statut de réfugié doit se voir accorder une audience, avoir la possibilité de présenter ses arguments et avoir sa demande jugée en toute objectivité. Cela correspond au sens de justice bien connu des Canadiens. Plutôt que de donner à tous accès au système, le gouvernement propose de sélectionner les demandeurs avant qu'ils aient eu une audience s'ils viennent d'un soi-disant «tiers pays». Ou s'ils ne peuvent établir ce que le gouvernement considère comme un minimum de fondement. Le rabbin Plaut a étudié ces notions et les a rejetées. Il a repoussé l'idée

de refuser ceux qui ont ce que l'on considère comme des demandes manifestement non fondées. Il a étudié cette pratique dans les pays qui ont essayé de l'adopter et il l'a trouvé néfaste. Dans ces pays, certaines demandes qui d'abord avait été jugées comme manifestement non fondées, ont été ensuite considérées comme légitimes par un palier d'autorité supérieur.

Under the government's proposed legislation, claimants from countries on a predetermined list established by Cabinet (that may have nothing to do with their personal circumstances) will not get a hearing. There will be no opportunity for them to refute the assumption established by Cabinet that the country to which the government wants to return them is indeed safe. The inquiry will be limited to determining where the person came from. The Minister referred to protection in his speech, but prior protection is not in the law. If the law said that, only those who have prior protection would be returned to the countries from which they came, and there would not be the disagreement that exists today.

At this conference we have learned that we are part of a whole, a system made up of many different parts, and that the effect of our actions must be considered in the light of their effect on the system as a whole. Refugee determination in Canada is only a small component of this system. Moving spontaneously to a safe haven is a solution for only a relatively small number of refugees. But, as Mr. Rizvi said, refugees are not problems to be solved but human beings to be understood and helped. Preserving the possibility of moving spontaneously to a safe haven may not solve the problems of all refugees, but it makes a difference to those who are afforded that opportunity. What about the effect of our actions on the system as a whole? How will other countries treat refugees if we in Canada fail to meet our responsibilities – bearing in mind the situation of Canada, a huge country with a relatively small population?

In taking the restrictive measures proposed in Bills C-55 and C-84, Canada attempts not to share the burden but rather to shift it. This conference has shown that, if we have any concern for the whole system, we must address the question of numbers in a multilateral fashion, not by the unilateral methods proposed by the government. Only through a multilateral approach can we address this question, if we indeed perceive it to be a problem, without violating the Convention or provoking a breakdown of the system.

We are also reminded by Mr. Rizvi of the decline of multilateralism. On this point, I would simply state that there are efforts being made to rekindle multilateralism. There are many in this world who recognize that it is only through multilateral action that we can save the planet – that refugees, acid rain, depletion of the ozone layer, and diseases like AIDS do not respect national

boundaries. Mr. Weiner has made some of the same observations but he comes to different conclusions. Canada, with its tradition of commitment to multilateralism, should be in the forefront of the drive to reinvigorate the United Nations, to strengthen international organizations and develop international law. It is simply astonishing to me that the Minister of Employment and Immigration can stand up before an audience in this country, as he did at this conference, and say that we should rely less on international legal obligations. We need a consistency of approach. Canada's credibility will be lessened if we fail to uphold one of the major instruments of international co-operation. Roger Winter said that having dirty skirts impairs our ability to provide leadership; another way of putting this might be by recalling the old rule: "He who seeks equity must come with clean hands."

Dan Heap, M.P.
*Spadina**

I want to make three points. I want to pose a question: why is Canada reversing its refugee policy? Second, I want to discuss Bills C-84 and C-55 as part of a planned attack on the human rights of refugees. And I want to deal with the question of the domestic policy that led to that attack.

Since World War II, Canada has developed a moderately good refugee policy, with the encouragement of a post-war policy of doubling our population with the baby boom and with immigration (and, of course, incidentally bringing in primarily white and anti-communist people). In the late 1970s and the 1980s, there was a new surge from other former colonies (mostly non-white and not all so anti-communist as some of the notables that arrived from Europe after World War II). We progressed as far as the *Singh* decision of April 4, 1985, in which (according to Jeff Salet of *The Globe and Mail*) the Supreme Court struck down a section of the *Immigration Act*. The Court said six Sikhs from the Punjab region of India and an Indian woman from Guyana could not be deported from Canada until they had been given the opportunity to testify in person at full hearings of

* New Democratic Party Critic on Immigration and External Affairs (Central America). The text is a modified version of Mr. Heap's speech.

the Immigration Appeal Board that they were refugees fleeing from persecution.

That decision was, I think, the high point in our development of refugee policy, and many of us hoped that it was also a signal to other countries. However, the next day, the immigration minister of the day, Flora MacDonald, said that while she had ordered her officials to comply with the decision of the Supreme Court, she had asked them to find new procedures for weeding out those who claimed falsely to be refugees. The point is that the Court had already said what the procedure should be and the Minister next day said that her department would find a different one – so much for the respect of this government for the Supreme Court and for human rights.

The signal to be sent to other countries was delayed while the Minister sought a report from the House of Commons Standing Committee on Labour, Employment and Immigration, chaired by Jim Hawkes, which reported in November 1985 that it was substantially in agreement with Rabbi Plaut in his report to the Minister. But 25 months after the Minister said she would find other means of weeding out false refugees, on May 5, 1987, the government introduced Bill C-55. Most of the people who had spoken to the Standing Committee, who have worked in refugee matters, and who have helped the government to resettle refugees and to identify them were shocked by the bill. The government had used very expensive publicity to put forward what most of us considered highly misleading statements. Two months later, there was the "Sikh ship", as it was called, with orchestrated hysteria – orchestrated by the immigration department and, more than the department, by the Minister and by the Prime Minister. Then on August 10, the government introduced Bill C-84 to deal with the arrival of ships. Now the signal to other nations was to reverse their policy on refugees as Canada was doing. The question is why, which brings us to my second point.

Bills C-55 and C-84 seem like a planned attack on the human rights of refugees. In its new system for determining refugee status, Bill C-55 does have some good points. It declares a right to the determination of refugee status and it declares that, if accepted, a person has a right to landing, subject to the normal limitations of immigration priorities such as security and health. But the bill is a detailed, 62-page piece of 'legalese' that ignores the fundamental points made by the Standing Committee's report of November 1985. In fact, the Minister and the government, in violation of parliamentary procedure, have never given a comprehensive answer to the points raised in this report, despite the fact that it had mainstream public support. Instead, for a year and a half the secret preparation of a different bill was undertaken. In fact, the preparation began long before then within the bureaucracy. When the bill was

brought to committee, more than 60 witnesses spoke against it. Nobody spoke for it, except senior officials and the representatives of the international airlines, who did not want to lose money in the process.

The bill violates the principles of the Plaut Report and the report of the Standing Committee on Labour, Employment and Immigration. Here are a few of the serious points. The first problem is the removal order. A person who claims to be a refugee in Canada is guilty unless and until he can prove himself innocent and, until then, is placed under an order of removal. The burden of proof is on the accused, and the claimant has only a very short time in which to show this. This reverses the principles put forward not only by Plaut and the Standing Committee, but also by the UN Convention that Canada signed and that says we are to give the benefit of the doubt.

The bill also contains a restriction on the right to counsel: unless a person can get his own lawyer quickly, the government will provide one, and we all know what to expect from a lawyer who is paid by the same person as the judge. There is a screening, first, on eligibility: if you come from a country where, in Canada's opinion, you would have a fair chance of making your refugee claim, you will be sent back there. There is no assurance at all that Canada's opinion will be shared by the country to which you will be sent back. The second screening is on credibility: but if your country of origin is considered democratic, one will know before the hearing that you are not a refugee and you will not be heard.

In either case, the claim will not be heard as the Supreme Court decision required. There will be no examination of the claimant's story on its merits. There is a denial of the principles of individual rights, of each case being examined on its merits, and a denial of the Supreme Court requirement for an oral hearing on merit. There is also no appeal on merit, only an appeal on points of law and only with the leave of the Federal Court. If a person is judged by the Minister in private to be a danger to the public or a security risk, he will be removed without even a screening and will have no chance to claim refugee status. This also violates the principles of the United Nations.

After the boatload of 173 Sikhs and one Turkish woman had been held incognito for a week or more and inflammatory statements were made by the Minister and the Prime Minister, Bill C-84 was introduced in Parliament. This Bill requires detention, with the Minister's permission, for periods that can be renewed with very slight public review and little respect for habeus corpus. There is no right for the accused to know the charges or the evidence against him. The Bill establishes the power to turn away ships at sea if they might contain people without visas. How this is to be done with due regard

for the UN Convention we are all waiting to see, since ship passengers will not be examined on board to find out whether they are refugees.

Under the bill, any Canadian who aids a person to come to Canada without a visa, when one is required, will be punished. In other words, the thousands of Canadians who now help refugees to come to the nearest immigration post in Canada could be sent to prison. The current Minister, Mr. Bouchard, has promised not to do this, but he does not say why he wants a law to enable him to do what he has promised not to do. There will be search and seizure rights to break into people's homes to see documents, which might very well injure not only those people but also the people that they have been trying to help.

What was the domestic policy that led up to these developments? What, in Canada, has led to this reversal of response to refugees? We need to recognize that Bills C-84 and C-55 take away not only the rights of refugees, but also the rights of Canadians. It is Canadians who are losing their protection against break and enter or search without warrant under the proposed policy. It is Canadian lawyers who may be criminalized for giving advice to a refugee about Canadian law. It is Canadians who are losing their right of judicial review in immigration cases by having the right of appeal reduced, not just in refugee cases, but in ordinary sponsorship cases. The Canadian government, playing upon fear throughout this year, has attacked the human rights not only of refugees, but of those Canadians who help refugees, of unions, of Canadians who have run afoul of the law, and of anybody if the government declares a peace-time emergency. In other words, what is afoot here is the building of the basis for very repressive government of a kind Canadians have never known or expected in Canada. Unfortunately, refugees were, I think, one of the targets.

Discussion

In the discussion following the parliamentarians' presentations, attention focused principally on the questions of access to determination under the proposed legislation and the government's policy toward refugees.

Speakers observed that the government had not accepted the recommendations of the Plaut Report or the Hawkes Committee and were interested to discover what the government believed to be the advantages of the proposed legislation when compared with these previous proposals.

The response was made that Bill C-55, in particular, provides a better set of legal rights and protections to Convention refugees in need of protection than currently exists. This is because an administrative officer cannot refuse admission. The decision that admission should be refused is taken at what would be called an appeal level (in the legislation this is called an inquiry). The claimant appears in person with legal counsel, paid for by the taxpayer. The claimant also has the right to appeal to the minister. Administrative officers can invoke humanitarian and compassionate grounds in cases where they are justified so that a ministerial permit can be issued to allow the claimant inside the country, with guaranteed status for a limited duration, to pursue a refugee claim. Such features do not exist in Canada's current refugee determination legislation. In addition,

Bill C-55 makes it impossible, in statute law, to prosecute or convict a refugee, or refugee claimant, for breaking Canadian immigration laws – a protection that does not exist under the current legislation.

Discussion then proceeded to examine the propositions that the government's Bill C-55 denied universal access to determination and that this was a fatal flaw in the proposed legislation. Commentators argued that until the "credibility" stage claimants have no opportunity to demonstrate their identity as a refugee in need of protection. It was thus a matter of fundamental concern that a person should be summarily removed from Canada without ever having had the opportunity to convince this country that he or she have a right to be heard in the context of their case.

It was argued, in response to these views, that the proposed amendments to the Immigration Act will result in legislation that very closely approaches universal access. Adherence to the 1951 Convention is felt to be important for Canada, and it is believed that there should be an unrestricted right to seek residence in Canada for persecuted people who need such residential protection. The proposed legislation, it was argued, protects that right. Thus, when someone arrives at the border they cannot be refused admission in the first instance without an appearance at an inquiry, without a further court appeal and without the right of appeal to the minister. They must have legal counsel provided at a hearing, which is held before a member of the Board and an independent adjudicator.

The government is aware that many have been concerned by the notion of return to "a safe third country" and how this affects access. It was argued, however, that such a provision, in terms of eligibility for a full and complete hearing, is really a multilateral concept for the future. If nations want to work together on this issue, there has to be a multilateral agreement whereby countries will take back those individuals for whom they have the responsibility to provide determination. Without such co-operation, the provision in the legislation is inoperative and can, indeed, be avoided by the issuance of permission at the border to come to an inland hearing.

In terms of eligibility, it was argued that it was an unfair characterization to say that anyone who arrives at Canada's borders will be denied an opportunity to state their case. The preliminary examination provides the first opportunity to explain one's case to the administrative officer, a second opportunity is to one's counsel, a third opportunity may or may not exist in the inquiry, and the fourth opportunity is on petition to the minister. Indeed, it was argued, such repetition is deliberately incorporated in the proposed legislation to provide not only a set of rights, but also an additional opportunity system for unique cases.

On the issue of credibility, it was argued that if a claimant cannot produce any evidence that might lead to the conclusion that he or she was a Convention refugee, then it was inappropriate for the claimant to remain in Canada for three to six months for determination to occur. Similar preliminary hearings occur in the criminal system under Canadian jurisprudence, a procedure that has worked well. Indeed, it was stated that the public would not tolerate fraudulent refugee claimants remaining in Canada longer than three to six weeks.

Claimants who are unable to tell their stories adequately will be aided by the Crown's obligation to provide evidence of the Refugee Board's previous determinations of people in like circumstances, and the courts will protect claimants' rights to adequate time to state their case. When these provisions are combined with the need to stop abuse, it can be seen that the proposed system provides adequate opportunity to explain why one needs protection in Canada.

A number of participants disagreed with this interpretation of the proposed legislation's position on access. Thus, the statement that the preliminary hearing provides an opportunity for the person to state his or her case ignores the clear language of the proposed legislation, which provides for no discretion if a country is prescribed by Cabinet as complying with Article 33 of the Convention. In other words, if the country does not *refoule* refugees, either universally or with respect to a class of persons, there is no opportunity for claimants to state their case. The Refugee Board member and the adjudicator are given no discretion whether that person will be sent out of the country.

Similarly, participants argued that the broad statements concerning procedural guarantees should be contrasted with a careful reading of the proposed legislation. The Refugee Board will not be a court of record; it will have the powers of a commissioner under the Inquiries Act. It was noted that lawyers before the House of Commons committee have said that this would prevent them making Charter arguments. On the subject of what has been called an 'appeal' (it is really, they argued, a hearing on merits), the claimant has to provide a lawyer at his or her own expense. Yet, if this is their appeal and their most important guarantee, why is Canada not providing a lawyer at this hearing? Commentators noted that while Canada will provide a lawyer at the pre-hearing (as they preferred to call it), the claimant must act quickly to select a lawyer of his or her choice. If they are unable to do this within a day or two then they must work with a government-appointed lawyer; this is one of the reasons the Canadian Bar Association has opposed Bill C-55. Some lawyers have also argued that the need for leave to seek judicial review is unprecedented in all of Canadian law.

Other participants observed that the speed of the hearings might be too great for many refugees who are frightened of authority or too disoriented by their recent experiences to give their full story at a first or second telling; such a system favoured those, including abusers, who had been able to prepare their case in advance. Certainly, it was argued, the various avenues of prescreening would confuse all but the well-prepared, and it would therefore be fairer to move all claimants directly to a full and fair hearing of their claims. For these reasons, many felt that the proposed legislation does not provide the fullest procedural guarantees; indeed, the proposals move in the opposite direction.

Three other areas of the government's approach were questioned during the discussion. It was observed that the government had argued that of the three classes of immigrants to Canada in 1986, the highest proportion fell into the Family Class, the second largest into the Refugee Class and the third largest into the Independent Class. However, it was argued that such a ranking depended on including certain categories of the Independent Class in the Family Class. If the data are reorganized into their proper classes it can be seen that the Independent Class followed the Family Class and preceded the Refugee Class in order of importance. It was suggested that such a situation needed clarification: the government should provide data on the correct proportions of the three classes of immigrants and explain why different (and often contradictory) data are released. Second, commentators sought to discover why the government felt it had to follow public opinion on this issue rather than to show leadership and, third, how it was possible to reconcile the apparent contradiction between the government's objective of increasing overall immigration levels (to encourage economic growth) with the objective of introducing much more restrictive refugee legislation – despite the fact that the government has been unable to meet its own annual targets for immigration levels?

In response, panelists agreed that government data on refugees were not straightforward. However, it was noted that when examining statistics for 1986 it was necessary to consider how the numbers admitted under the Administrative Review were categorized. When considering Canada's ability to meet immigration targets, it should be noted that overall targets are now more likely to be met than they were in the recent past, and that refugees who have been granted permanent residence are able to bring their families to Canada – although it is difficult to gauge the long-term impact of this on future immigration levels. It was further argued that, in terms of the admission of refugees to Canada, evidence shows that with the change of government to the Conservatives in 1979 there was a large increase in admissions; numbers fell again under the Liberal

government, but since 1984 (when the Conservatives returned to power) there has been a more gradual but significant increase in numbers. The government, it was stated, has been consistent in its attempts to persuade the public that increased immigration levels – including increased refugee admissions – are good for the country.

This response provoked some concluding discussion; commentators observed that the increase in admissions in 1979 was attributable to Canada's response to the situation in Indochina, and the reduction in immigration levels under the Liberals was a temporary response to cope with the severe global recession of 1981-82. It was argued that the government's stated desire to increase refugee admissions disguises the fact that the thrust of its proposed legislation is to ensure that refugees are chosen abroad according to Canada's needs for specific skills, not to allow refugees the opportunity to seek their own salvation – as the Convention requires – by arriving on Canada's borders. However, this is an opportunity that Canada should be defending if it seeks to uphold its international obligations toward refugees.

Refugee Determination in Canada

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I want to put into perspective some of the policy and administrative constraints within which we had to work when bringing forward the legislative proposals (Bills C-55 and C-84) that are the topic of this part of the session. Before I do this, however, let me say that I agree with much of the analysis that has been made of the historical and legal development of the determination system in Canada. I am grateful to see that the authors recognize that some limitations ought to be imposed. I also note that there is an acceptance that, in the determination system being brought forward in Bill C-55, the government should close some of the loopholes; and that we all should be concerned about the availability of effective remedies.

In terms of administrative and policy concerns, some of the remarks made today have implied that we should tolerate the abuse of refugee determination systems because of our overriding moral and legal obligation to accommodate the poor. However, this is not a part of our policy on refugee determination. Such an obligation is well beyond the realm of refugee policy and lies in a much broader area of humanitarian concern for the poor and oppressed – an area where the Canadian government is active in many tangible ways to help people in different situations suffering from poverty, oppression, alienation and lack of rights. The refugee determination policy deals specifically with the question of international protection of people who meet the

Convention definition; and, rather than condone abuse, the objective is the exact contrary – to combat abuse so that the very considerable resources now going into litigation and into the operation of determination systems for people – the majority of whom do not have well-founded claims – might be redirected to people who are in need and to whom more effective assistance can be rendered.

Concerning the question of the determination process, some speakers have suggested that everybody should be allowed into Canada and should receive a fair determination before a competent authority. In that way, with speedy decision-making, they argue that abuse will diminish and eventually go away. It is a simple principle that everyone can certainly accept intellectually, but it really does not work in practice. It does not work because of the convergence of immigration and refugee protection matters discussed by previous speakers. The refugee who appears at the border seeking our protection is indistinguishable from thousands of other would-be immigrants who appear without proper documents to validate their legal admission. Any rights available to refugees are also available to anyone else willing to say that they are refugees. We have to deal with some 35 million people a year who are not Canadians and who cross Canadian borders. Out of those, we have to deal with some 6,000 a month who are detected as being in violation of the *Immigration Act*. In short, we do not need to draw in another clientele – the clientele is always there.

Among that 6,000 a month, there are people who can legitimately engage our obligation to protect them under the 1951 Geneva Convention. The 'trick' of refugee determination is how to identify, precisely and efficiently, who those people are. I have already mentioned that for those concerned solely with refugee interests, the answer is to give everyone a hearing or, at least, to give everyone a hearing who wants one. However, in the administrative or bureaucratic sense, this produces great difficulties: your clientele develops faster than you can generate capacity to hear claims. Moreover, as Mr. Hawkes pointed out, the Canadian public does not want to support a system where people who obviously should not make a claim have access to a system as time-consuming and as expensive as refugee determination and that, conceptually, puts a procedure designed for very sensitive and accurate decision-making at the beginning of the immigration control process.

The system has to deal with large numbers of people with very different concerns, and our task as officials was to find some way of preserving the quality of decision-making for those people who had some substance to be adjudicated before a refugee tribunal. At the same time we had to find a way of excluding from the determination process proper (where the merits of a claim had to be fully considered

and adjudicated) those people who should not be there. After some samplings of the flows of people coming to Canada and claiming refugee status, we identified three groups that in conceptual terms could be legitimately excluded from the full determination process. The whole purpose of determination is to deal with people for whom the consequences of removal would be return to a country where they have a legitimate fear of persecution. But on the basis of our sampling, we could not conclude that the protection issue is paramount for the flow of claimants coming to Canada.

An analysis of recent flows shows that 80 per cent of the people who come to Canada and claim refugee status come from a country other than their own. They are not fugitives directly from the country that created whatever substance there is to the refugee claim. Fully a third or more of that 80 per cent are people coming from countries in Western Europe, most of which have a unimpeachable record of adherence to their Convention obligations. Of the 20 per cent coming directly from their own countries, who could be escapees from persecution, more than half came from countries that have had little or no incidence of successful refugee claims before Canadian tribunals. Thus, what is left out of that equation is a very small proportion of people who could legitimately engage Canada's protection as a primary need.

Consequently, in hypothesizing about which people could safely be excluded from the full determination process before the independent board (in addition to people who should clearly be excluded, such as "repeaters" and people who have already been in the Canadian system and received a decision), it was obviously those people who could not demonstrate a shred of evidence to substantiate their claims. Second, we concluded that other people could be excluded if they could safely be returned to a country that offers protection on the same basis as Canada does – provided it could be established, of course, that they had come from that country. Third, there was a very small group of individuals who would be judged as prohibited under the security or criminal provisions of the *Immigration Act* and whose offences were of a sufficiently grave nature to warrant their *refoulement* in keeping with Article 33 of the Convention, if they did in fact meet the Convention definition. That is the origin, therefore, of the Bill C-55 provision that, within the context of an immigration inquiry, assesses first whether individuals are eligible to claim Canada's protection and, if so, whether there is credible basis for that claim before there is a referral to the Refugee Board.

In his paper on the function and limits of the existing protection system, Dr. Goodwin-Gill has stated that the individual efforts of countries to implement the kind of measures proposed in Bills C-55

and C-84 are really only moving the problem sideways. Perhaps we do not agree on what the problem is. The greatest problem affecting the determination system in Canada at present is illegal migration. It is a problem that is not static or on the wane; it is dynamic and growing, and if it is left unchecked, it is going to make further inroads than it already has into the international system of protection. In Professor Grey's paper there is an exhortation that there is a legal duty to be generous and to take into consideration the individual circumstances of a person's case. Canada is generous, Canada has been generous and the Minister has provided assurances that Canada will continue to be generous.

But the determination system is not the be-all and end-all of Canada's generosity. It is one element, an important part of a totality that is exercised in many ways internal and external to Canada's immigration system. The idea that the determination system has to be more than a process for establishing whether a person merits Canada's protection loses sight of the fact that it operates within a sensitive immigration system that picks up the individual circumstances of the person who would otherwise be liable to be removed from this country. I find it ironic that a number of people who are so vehemently opposed to any participation of immigration officers in the refugee determination process want to place what are essentially immigration decisions in the hands of the Refugee Board. Bill C-55 presents a compromise, a high-quality determination system within a sensitive immigration system that responds to the individual circumstances of the case. It is not a perfect system, but I hope it will be judged in retrospect as a good system.

Des services pour les revendicateurs du statut de réfugié

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Madame Robic nous a décrit les activités et les engagements que le Québec a pris à l'égard des réfugiés et de l'immigration humanitaire; elle en a retracé les principaux résultats et nous a rappelé que 25% de l'immigration totale à destination du Québec était d'origine humanitaire.

Compte tenu du partage de juridiction entre le Canada et les provinces en matière d'immigration, le Canada, et donc le gouvernement fédéral, est le seul responsable de la reconnaissance du statut de réfugié; ceci en vertu du fait que le Canada, pays souverain et signataire de la Convention de Genève, est responsable du contrôle de ses frontières et de son territoire. En conséquence, il est également responsable des mécanismes administratifs et légaux devant être instaurés en vue de la reconnaissance du statut de réfugié.

Pour sa part, le Québec est responsable de certains aspects de l'immigration, notamment de la sélection à l'étranger et de diverses mesures d'accueil des immigrants, lesquelles mesures peuvent également être offertes aux revendicateurs au statut de réfugié. Mon exposé portera justement sur les conditions de séjour et sur les différents services offerts à ces revendicateurs qui sont en attente d'une décision fédérale. J'aborderai également les principales réflexions du gouvernement du Québec à l'égard de ces personnes.

Le Québec est intervenu à l'endroit des revendicateurs au statut de réfugié depuis l'automne 1982. Trois questions se posaient pour chacune des circonstances et pour chacun des services réclamés par les revendicateurs.

Premièrement, quel est leur statut légal? À l'évidence, ce ne sont ni des résidents permanents, ni des citoyens canadiens; compte tenu de la législation fédérale, nous pouvons convenir que ce sont des aubains et que ceux-ci relèvent constitutionnellement de la responsabilité exclusive du fédéral. Par ailleurs, les services auxquels ces revendicateurs s'adressent – qu'il s'agisse de services de santé, d'éducation et de services sociaux – interpellent directement les responsabilités provinciales.

Finalement, les revendicateurs peuvent être considérés comme étant des résidents de fait, notion définie à même celle du dictionnaire, en l'absence de considération juridique dans la législation provinciale. Pour résumer, on se retrouve donc, en terme de statut, avec une responsabilité constitutionnelle fédérale – en vertu de l'article 91 de la Constitution – une responsabilité québécoise compte tenu des services accessibles aux revendicateurs et un partage de coût entre Ottawa et les provinces des différents services sociaux qui leur sont offerts.

Au-delà de ce statut légal, se pose la deuxième question qui en est une de définition des services publics auxquels les revendicateurs devraient avoir accès.

Il est indéniable que ces personnes ont de besoins essentiels et particuliers découlant des difficultés qu'ils auraient pu rencontrer dans leur pays d'origine. Il est non moins indéniable, par ailleurs, que le volume d'arrivée des revendicateurs soulève des questions d'intérêt public telles la santé et le bien-être collectifs. Ce sont là des éléments de base à partir desquels nous avons dû définir des services aux revendicateurs en attente d'une décision fédérale.

La troisième question, tout aussi fondamentale que les deux premières, était de déterminer les critères d'accès des revendicateurs aux services publics. Deux options s'offraient : soit adopter des critères universels soit définir des critères particuliers à cette clientèle. L'une et l'autre option a ses avantages et inconvénients. D'une part, les critères universels, applicables de manière uniforme à l'ensemble d'une population ne permettent pas aux revendicateurs de faire valoir leurs droits en intérêts légitimes. Prenons par exemple la loi de l'aide sociale en vigueur au Québec. Celle-ci définit des critères d'admissibilité universels et des renseignements que tout demandeur doit fournir : détermination de son identité, de son âge, de son adresse de sa situation familiale, de ses dépendants, etc. Il doit en outre fournir des renseignements relatifs à son ou ses emplois, à sa famille, à ses biens matériels. Les revendicateurs qui se présentent à nos

bureaux au lendemain de leur arrivée au pays peuvent difficilement répondre à toutes ces interrogations. En conséquence, le Québec aurait souhaité vouloir mettre en place, à l'intention des revendicateurs, des programmes spécifiques assortis de critères particuliers. Cependant, les réactions prévisibles à une telle éventualité l'ont en quelque sorte remise en question.

Certains auraient objecté, à bon escient, qu'il y aurait eu discrimination à l'égard de ces revendicateurs par rapport à l'ensemble de la population. Par ailleurs, l'adoption de tels programmes aurait requis des pouvoirs dérogatoires importants par rapport aux législations et aux dispositions prévues dans le processus actuel.

Pour résumer, lorsque le Québec a dû évaluer les services auxquels les revendicateurs au statut de réfugié pouvaient ou devaient avoir droit, trois questions étaient constamment soulevées : celle du statut légal de ces personnels, celle des types de services auxquels elles devaient avoir accès et finalement celle des critères d'accessibilité à ces services.

En dépit de ces interrogations, les revendicateurs au statut de réfugié en attente d'une décision fédérale ont actuellement droit, au Québec, à des transports d'urgence, si besoin est, entre l'aéroport et Montréal, à un hébergement temporaire, à l'aide sociale, à des services de santé et d'hospitalisation 90 jours après leur arrivée, à l'aide juridique, à des cours de français, à des services psycho-sociaux et bien sûr à l'éducation pour tout enfant de moins de 16 ans. De plus, les organismes non gouvernementaux (O.N.G.), subventionnés en partie par les gouvernements, offrent, grâce au travail de leurs bénévoles, des services d'accompagnement lors de différentes démarches administratives, de recherche de logement et d'emploi ainsi qu'une aide matérielle. Il faut également préciser que les autorités fédérales permettent aux revendicateurs de travailler.

Telle est donc la situation actuelle. Toutes ces mesures ont été mises en place entre 1982 et 1983. Elles représentent, pour la présente année, un budget de l'ordre de 60 à 70 millions $, consacré à quelque 23 000 personnes qui forment environ la moitié des revendicateurs au Canada.

Un certain nombre de commentaires viennent à l'esprit lorsque l'on réfléchit à la situation que je viens de décrire. Ainsi, l'on peut penser que les services offerts aux revendicateurs sont trop nombreux, notamment pour ceux qui ne sont pas effictivement de véritables réfugiés. D'autres pourraient juger que ces services sont insuffisants pour les véritables réfugiés auxquels une aide additionnelle devrait être accordée. Par ailleurs, certains peuvent alléguer que les personnes qui frappent à nos portes ne représentent pas la totalité des réfugiés et que des gens encore plus démunis auraient besoin de notre

aide à l'étranger. Il faut également souligner que ce débat sur l'aide à fournir aux revendicateurs suscite des réactions dans l'opinion publique qui d'une part, distingue difficilement les situations personnelles vécues par les uns et les autres et d'autre part, tend à confondre les revendicateurs au statut de réfugié, les véritables réfugiés, les résidents permanents, les touristes de passage, les illégaux, etc.

Un dernier élément à considérer dans ce débat est que certains peuvent objecter que les mesures mises en place ont un caractère attractif et que bon nombre d'immigrants, voire même de travailleurs temporaires, n'ont pas accès à l'ensemble de ces services offerts aux revendicateurs au statut de réfugié. On invoque donc la nécessité d'instaurer des mécanismes respectueux des besoins des uns et des autres.

Comment, dès lors, esquisser une perspective d'avenir par rapport aux différentes questions qui viennent d'être soulevées? Nous devons appuyer notre réflexion sur quelques constatation assez évidentes, à mon avis. Premièrement, les revendicateurs au statut de réfugié sont une responsabilité de notre société. Deuxièmement, le phénomène récent de l'arrivée de revendicateurs dans notre pays va vraisemblablement revêtir un caractère assez permanent. Troisièmement, ces personnes ont vécu et vivent encore une situation particulière. Quatrièment, cette situation, qui pourrait être mise en parallèle avec celle des sinistrés, nécessite une intervention urgente.

Ces différentes constatations pourraient, dans un premier temps, militer en faveur de l'adoption de mesures particulières afin de répondre aux besoins particuliers de ces personnes. Ces besoins pourraient être qualifiés de temporaires tant et aussi longtemps qu'une décision n'aura pas été prise à leur égard. N'y a-t-il donc pas lieu de réfléchir à l'instauration de programmes spécifiques, visant nommément cette clientèle, plutôt que de la faire bénéficier des programmes universels que nous avons implantés en matière de santé, de services soxiaux ou d'éducation? Émettre une telle hypothèse soulève le risque d'une éventuelle discrimination à l'égard des revendicateurs par rapport à l'ensemble de la population. Cette discrimination pourrait d'autant plus nous être reprochée que le Canada et le Québec ont jusqu'à maintenant été les défenseurs acharnés des chartes et des régimes universels.

Finalement et pour conclure, la question qui se pose à nous est la suivante : pouvons-nous percevoir et identifier les revendicateurs au statut de réfugié comme un groupe pour lequel des mesures spéciales devraient être mises en place, à l'instar d'autres groupes ayant bénéficié de mesures et de programmes d'action positive?

Cette hypothèse, que je soumets à la réflexion collective, permettrait en définitive, d'envisager comment un gouvernement qui

s'engagerait à instaurer des programmes spéciaux pourrait le faire sans risquer qu'ils soient jugés discriminatoires par rapport aux programmes universels.

Discussion

The discussion following the papers by Raphael Girard and Paul Simard was a wide-ranging one and dealt not only with general questions of Canada's refugee policy but also with specific details of the proposed new refugee determination system.

Several speakers wanted to obtain clarification of the government's position on claimants' hearings under the proposed legislation. It was argued that statements in Mr. Weiner's speech appeared to suggest that every refugee claimant will have the opportunity to present reasons why his or her claim should be heard, and that the claimant will plead his or her case before a refugee board member and an adjudicator. Speakers wished to learn where these intentions appeared in the proposed legislation and wondered whether the implication that every claimant would have a hearing on the merits of the case was contradicted by the proposed pre-screening that would rule those from 'safe' third countries ineligible for determination.

In response, it was pointed out that sections 45 to 48 of Bill C-55 covered the situation; there was no intention to imply that there will be a hearing on merits for everybody. It is true, however, that everybody will get a chance to engage Canada's protection in a hearing between two independent decision makers (a member of the board and an adjudicator), with the aid of counsel. At this point a

claimant will be entitled to make a case for eligibility to claim, to know any case against him and to respond to it. That is considered to be a hearing process, and there are no pre-judgements concerning what will happen at that hearing.

The issue of the 'safe third country' was raised in a number of ways. Commentators wished to discover how many claimants might be affected by such a consideration, how the list of safe third countries would be prepared, whether the problems of 'refugees in orbit' would be exacerbated by such procedures and whether the lack of truly durable solutions and the open-endedness of protection might not affect the definition and interpretation of a 'safe country'. In response, it was observed that 80 per cent of people who claim refugee status begin their journey to Canada from countries that are not their own; of these, if coverage is restricted to European countries, approximately a third could be considered for return to safe third countries.

In terms of a list, the Minister of Employment and Immigration has invited the Department of External Affairs to make an assessment of which countries are upholding Article 33 of the Convention, and contributions will also be sought from the UNHCR and other interested groups. This list will then be submitted to Cabinet for the approval of other ministers. Concerning 'refugees in orbit', Bill C-55 is careful to exclude from any consideration of safe third country return those people who, on their way to Canada, have simply changed planes in another country. Furthermore, it must be stressed that individuals would be returned only if the conditions for return to a safe third country are fully satisfied.

Concerning the availability of durable solutions affecting the nature of protection, it was observed that while individuals in direct transit from a country where they are persecuted are permitted, under Article 31 of the Convention, to break the immigration laws of the country they enter, the same is not the case where people have temporary asylum but no durable solution. It was argued that legal means exist – in the form of Canada's embassies, agents in refugee camps and outreach programs – for such people to reach Canada. Therefore, in the government's opinion, there are only very weak grounds for encouraging people who already have genuine or *de facto* asylum to break Canada's immigration laws.

In response to the question of how the government distinguishes between oppression and a well-founded fear of persecution, it is noted that this was a technical issue. Those who require some form of assistance but are still within their own countries are not covered by the Convention and cannot be helped by the assistance that is available through the refugee determination program. Help has to be delivered in another way, using as outreach the political prisoner and oppressed persons selection system that is administered through

Canadian embassies and consulates abroad. On a more philosophical level, it was observed that the term 'oppression' should be seen as a more generalized concept, while that of 'persecution' operates on a more individual basis, at least as far as the application of the Convention is concerned.

A number of commentators noted that while the government is emphasizing that the preferred means for refugee entry into Canada in the future will be for individuals to apply at Canadian posts abroad, the lack of such posts in key areas makes this difficult or dangerous in practice. Thus, Bolivians who wish to apply for refugee status currently must go to Lima, Peru to apply, and Hondurans must go to Guatemala. In response, it was noted that oppressed individuals cannot be considered refugees until they are outside their own country. Canada is one of the few countries that goes beyond the Convention definition in certain circumstances, using the political prisoner and oppressed persons selection program, to help such people. However, the 1976 Immigration Act requires anyone who wants to settle in Canada to obtain a visa before entering—people were not given the right to come to Canada and claim refugee status. Therefore, when Canada organizes to help people who are oppressed it is usually through outreach programs. In addition, it was noted that the government does send in temporary missions to alleviate the lack of posts in areas of concern. For areas that are not so turbulent, the lack of a post has not been considered so crucial a factor in people obtaining visas in the past. The case of Guyana, which until a few years ago had no permanent Canadian mission, illustrates this; for years the country was among the top 10 sources of immigration to Canada. In passing, it was observed that an entirely open system does not work, as past Canadian and current Danish experience illustrates; such determination systems are used by large numbers of people who simply have immigration problems.

The proposed legislation necessitates changes in handling those who are not refugees but might be eligible for humanitarian and special programs. In response to speakers' questions, the new process was outlined as follows. Prior to referring any inadmissible persons to the inquiry process, a senior probation officer will determine whether those persons might be eligible under Canada's humanitarian and special programs. If so, the case will be referred for investigation either in status or under a Minister's Permit and, if successful, will be referred to the landing process; if not, the case will be recycled in the claims process. Humanitarian reasons for not removing individuals will continue to be applied on a case-by-case basis, but the minister has yet to decide whether this should occur before or after the determination process has examined the case.

Concern was expressed during the discussion that Canada was not addressing important weaknesses in the existing international system of protection. Thus, Canada receives so many refugees and asylum-seekers from Western and developed countries, in what is in effect a sideways movement, because there is no agreement between states on the limits of protection. There is no agreement among states on the responsibility to examine claims or on the possibility of according either temporary or permanent solutions and – as a result of this lack of basic agreement – there is no agreement concerning the return of asylum-seekers to the country where they first lodged their application. These issues need attention and, regardless of domestic legislative considerations, Canada ought to show international leadership by dealing with these problems. Other speakers were concerned that restrictive measures might serve to heighten the North-South divide and might only be creating a tense situation for subsequent generations to resolve.

In response, it was observed that the government was anxious about the number of asylum-seekers the country receives because they form a large, unplanned component of annual immigration and because it was felt that spontaneous flows have a significant potential to generate public reaction against not only the participants, but other refugees, other immigrants and, eventually, all visible minorities unless public confidence in the system is restored.

During the remainder of the discussion, a number of other topics were raised. In response to one speaker's question, it was observed that by October 1987, 6,000 of the 23,000 refugee claimants authorized to work in Quebec were receiving social assistance; the remainder were either working or not claiming assistance. It was noted that the public needs to be much better informed by government and NGOs about the problems of refugees than they are at present. Studies demonstrate that once people are informed about the issues, there is a public willingness to accept a determination system that provides all claimants with the opportunity for a fair hearing. This willingness, if tapped by the government, would prevent any potential backlash against refugees.

Speakers disagreed with the government's stated belief that a speedy determination process could not eliminate abuse. They argued that this was not a legitimate conclusion because such a solution had not been tried, as the NGOs had suggested. Indeed, others observed that it was unfortunate that the government had not taken much of the advice offered by NGOs and concerned individuals, despite all the consultations that had occurred. By way of response, it was pointed out that such consultations may not have produced everything the NGOs wanted, but they had, nevertheless, resulted in an adversarial

hearing, the two-member panel, the independent board and many other features being incorporated into the new system.

Le Québec et l'immigration humanitaire

L'honorable Louise Robic
Ministre des Communautés Culturelles
et de l'Immigration du Québec

Avant de faire le point sur l'expérience du Québec en matière d'immigration humanitaire et d'évoquer les principales interrogations qu'elle pose à notre société, il convient de rappeler les étapes qu'a franchies le Québec dans l'affirmation de ses droits en matière d'immigration.

La Constitution canadienne de 1867 a fait de l'immigration un domaine de compétence partagée sans préciser toutefois les attributions propres à chaque ordre de gouvernement. Même si le Québec avait envoyé des «agents recruteurs» en Europe dès le milieu du XIX[e] siècle, il faudra attendre la période dite de «la révolution tranquille», 1968 plus précisément, pour qu'il se dote formellement d'un ministère de l'Immigration. Cette création s'inscrivait dans le cadre d'un vaste mouvement d'affirmation nationale et de modernisation de l'État. Il est intéressant de constater d'ailleurs que, dès cette époque, la collectivité québécoise a reconnu dans l'immigration un élément majeur quant à la préservation et à l'affirmation de son identité culturelle et quant à son développement au plan démographique et économique.

L'évolution ultérieure du minstère de l'Immigration sera marquée par la conclusion de trois ententes administratives entre le Gouvernement du Québec et celui du Canada. La dernière, celle de 1978, lui confère de larges pouvoirs en matière de sélection des

ressortissants étrangers qui souhaitent s'établir au Québec à titre permanent ou temporaire. Une entente qui est toujours en vigueur et dont les grands principes, selon le récent accord constitutionnel du Lac Meech, sont intégrés dans une constitution canadienne à laquelle nous, Québécois, pouvons enfin adhérer.

Après ce préambule un peu long mais nécessaire pout situer notre action dans sa perspective historique et souligner la sensibilité toute particulière du Québec à l'égard de l'immigration, il convient maintenant de considérer l'une des composantes majeures de cette dernière: les personnes accueillies en raison de considérations humanitaires.

Que faut-il entendre par cette expression: immigration humanitaire? Nous savons tous que l'oppression, l'emprisonnement arbitraire, la persécution, la torture, l'assassinat politique et la guerre civile sont des pratiques ou des situations courantes dans de nombreux pays. Les personnes qui cherchent à se soustraire à de pareilles conditions, constituent l'essentiel de ce mouvement migratoire.

Il faut distinguer, dans ce mouvement, deux grandes catégories:

Il y a d'abord les réfugiés reconnus comme tels par le Canada, et correspondant à la définition qu'en donne la convention de Genève sur les réfugiés de 1951, modifiée par le Protocole des Nations Unies de 1967.

Une seconde catégorie regroupe toutes les autres personnes sélectionnées pour des raisons humanitaires. Il est bien connu, en effet, que la définition du réfugié au sens de la Convention peut poser divers problèmes d'application: les délais d'examen d'une demande de reconnaissance du statut de réfugié peuvent être fort longs, des personnes peuvent se trouver en réelle situation de détresse sans pour autant correspondre exactement à la définition de réfugié, ou il peut être difficile pour un individu de faire la preuve qu'il est effectivement un réfugié au sens de la Convention de Genève. Compte tenu de ces difficultés, les gouvernements du Canada et du Québec ont inclus, dans leur réglementation de sélection des immigrants, diverses dispositions les autorisant à accepter des individus se réclamant de considérations humanitaires Sans entrer dans le détail de cette réglementation, disons que cette seconde grande catégorie regroupe les personnes fuyant des pays marqués par des troubles politiques de diverses natures et, dans une proportion moindre, les victimes d'un cataclysme naturel.

La distinction que je viens d'apporter entre les deux grandes catégories d'immigration humanitaire me paraît très importante si je me réfère aux statistiques récentes dont nous disposons sur ce

mouvement. Ainsi, durant la période comprise entre 1980 et 1986, le Québec a accueilli, toutes catégories confondues, un total de 35 198 personnes pour des raisons d'ordre humanitaire. De ce nombre, un peu moins de 5 000 personnes avaient été reconnues comme réfugiés au sens de la Convention, ce qui représente environ 15 % du total; le reste du mouvement, soit 85 %, donc le plus grand nombre, était composé de 30 000 personnes sélectionnées en fonction de leur situation de détresse mais non reconnues comme des réfugiés au sens de la Convention de Genève. Ces quelques chiffres permettent, je crois, d'illustrer les limites de la définition actuelle d'un «réfugié» et de son application dans le contexte mondial que nous connaissons. Ils mettent aussi en relief l'importance, pour les pays d'accueil, d'une politique d'ouverture permettant de dépasser cette stricte notion de réfugié.

Voyons maintenant quel bilan on peut faire de la contribution du Québec en matière d'immigration humanitaire. Auparavant je me dois de vous signaler quelques limites à l'exercice de notre pouvoir de sélection. D'une part, des limites dans le temps puisque le Québec ne dispose véritablement d'un tel pouvoir que depuis 1979. D'autre part, des limites par rapport à la sélection des réfugiés selon la Convention, puisque l'octroi d'un tel statut relève de la juridiction exclusive du gouvernement canadien.

Ces réserves étant dites, faisons maintenant un bref survol historique de l'immigration humanitaire au Québec. En fait, jusqu'au milieu du XX^{e} siècle, ce type de mouvement se confond avec l'immigration de peuplement qui se pratiquait sporadiquement depuis le début de la colonisation. Ainsi, une partie de l'immigration reçue des Îles Britanniques au XIX^{e} siècle avait pour source les tensions politiques et sociales qui marquèrent le début de la révolution industrielle dans ces régions.

Il faut attendre la fin de la seconde guerre mondiale pour que la notion de réfugié se manifeste de façon plus explicite. En 1949, le Canada annonce qu'il tiendra compte, dans sa politique de l'immigration, du pressant problème du réétablissement des personnes qui se trouvent déplacées ou sans foyer par suite du conflit mondial. Pour les dix années qui suivent, il admettra 186 000 réfugiés et personnes déplacées en provenance de l'Europe. Une bonne part de cette immigration transitera et même s'établira alors au Québec. C'est à cette époque que se constituent ou se consolident des communautés culturelles qui jouent par la suite un rôle important dans notre vie collective. Je pense notamment, aux communautés juive, polonaise, ukrainienne, allemande ou balte.

Puis, à la suite des événements de 1956, le Canada accueille quelque 37 000 réfugiés hongrois, dont 10 000 environ s'établissent au Québec. À cette occasion, de nombreux organismes, tant

gouvernementaux que privés, contribuent à faciliter le premier établissement de ces personnes.

Pendant les années soixante et le début des années soixante-dix, le Québec participera successivement à l'accueil de réfugiés de la Tchécoslovaquie, des Asiatiques expulsés d'Ouganda, des Chiliens fuyant le coup d'état de 1973 et des premières vagues de réfugiés indochinois et libanais.

En 1969, le Canada devient signataire de la Convention de Genève sur les réfugiés puis, en 1976, une nouvelle loi canadienne de l'immigration est adoptée. Celle-ci, et les règlements qui en découlent, intègrent la notion de réfugié ainsi que celle de «personnes déplacées ou persécutées». Ayant acquis en 1978, par l'entente Couture-Cullen, l'essentiel de ses pouvoirs actuels en matière de sélection de l'immigration, le Québec inclut lui aussi des notions équivalentes dans sa législation et sa réglementation.

Quelques mois plus tard, le Québec va, de façon spectaculaire, commencer à exercer ses pouvoirs de sélection en faveur des personnes en situation de détresse. À partir de 1979, en effet, on assiste à la seconde vague des réfugiés indochinois, ceux qu'on a appelés les «boat people». En trois ans, soit de 1979 à 1981, le Québec accueille plus de 15 000 de ces réfugiés. Cet accueil se réalise à la faveur d'une mobilisation sans précédent de la population québécoise. Au-delà de mille groupes de parrainage se constituent, dans toutes les régions du Québec, et des centaines d'organismes publics et privés participent aux efforts en vue de l'établissement de ces nouveaux québécois.

Un des efforts les plus originaux du Québec pendant cette période consiste à choisir, parmi ces réfugiés, une large part de personnes négligées par les autres pays d'accueil. Ce fut vrai notamment pour les Kampuchéens et les Laotiens, pour les enfants mineurs non accompagnés et pour les tuberculeux.

En 1980, après en être arrivé à un accord à ce sujet avec les autorités fédérales d'immigration, le Québec met en oeuvre un programme de régularisation de statut au profit des Haïtiens se trouvant clandestinement sur son territoire. Au cours des deux années suivantes, plus de 4 000 personnes craignant de retourner en Haïti en raison du régime politique en vigueur dans ce pays obtiendront le droit de résidence permanente au Québec en vertu de ce programme.

Jew rappelle aussi que, de 1980 à 1986, le Québec a accueilli, toutes catégories confondues, un total de 35 198 personnes considérées en situation de détresse. Globalement, cela veut dire que, durant cette période, dont le début coïncide à peu près avec l'acquisition d'un réel pouvoir de sélection pour le Québec, environ 27 % de son immigration a été choisie en fonction de critères humanitaires. Ce total comprend les 2 431 revendicateurs du statut de réfugié dont la situation a été

régularisée en 1986 dans le cadre d'un programme dit d'examen administratif auquel le Québec participait après entente avec les autorités fédérales. C'est d'ailleurs un événement qui mérite d'être souligné car il préfigure les accords du Lac Meech en nous permettant pour la première fois de participer à la sélection de personnes déjà entrées au pays.

Il est à noter que ce total de 35 198 immigrants sélectionnés pour considérations humanitaires ne comprend pas les parents de ces personnes qui, à leur tour, ont pu être acceptés par le Québec en vertu du principe de la réunification des familles. Il faut pourtant en tenir compte lors de la détermination des niveaux d'immigration et pour évaluer la véritable importance de l'immigration humanitaire.

On ne peut compléter le portrait de cette dernière sans aborder la question très préoccupante des revendicateurs du statut de réfugié, c'est-à-dire des personnes qui demandent le statut de réfugié lors de leur arrivée au Canada et qui, à ce titre, sollicitent l'autorisation de demeurer au pays comme résidents permanents. Ce mouvement n'a cessé de s'amplifier depuis quelques années si bien que le nombre actuel de revendicateurs au Canada est d'environ 40 000, dont plus de la moitié séjourneraient présentement au Québec. Une telle popularité s'expliquant en grande partie par la rapidité avec laquelle le Québec a pourvu aux besoins essentiels de personnes qui, pour la plupart, sont totalement démunies.

J'achève ici ce survol rapide de l'action du Québec en matière d'immigration humanitaire. Je crois qu'on peut, à bon droit, estimer que la société québécoise y a fait preuve d'ouverture et de générosité.

Il faut s'en montrer fier en souhaitant que dans ce domaine le passé soit le garant de l'avenir. En n'oubliant pas, toutefois, que la sensibilité de l'opinion publique est fragile et qu'elle n'est pas à l'abri de la xénophobie et du repli sur soi: réactions qu'entrainent souvent la différence incomprise, la peur du changement et surtout le manque d'information.

Le Gouvernement du Québec en est d'ailleurs convaincu puisqu'il a demandé à mon Ministère, en collaboration avec d'autres corps publics, d'organiser une campagne en vue d'informer l'ensemble de la population sur les multiples facettes de l'immigration, dont celle à caractère humanitaire, et sur l'apport important qu'elle constitue pour la société québécoise. En généralisant la discussion et la consultation sur la place publique, notamment lors de la détermination des nivaux, le gouvernement considère que la population se sent davantage concernée par une situation qui ne lui est pas imposée et qui résulte si possible de ses choix de société. Ainsi, le degré d'ouverture et la qualité de l'accueil que la population réserve aux nouveaux arrivants peut dépendre grandement de l'information dont elle dispose sur les dimensions économique, sociale et culturelle des

changements qui s'opèrent en elle. C'est dans ce cadre d'ailleurs qu'il faut situer la déclaration solennelle sur les relations interethniques et interraciales que le Premier ministre, le ministre délégué aux Affaires autochtones, les ministres de la Justice et des Relations internationales, et moi avons présentée à l'Assemblée nationale où elle a été adoptée à l'unanimité le 10 décembre de l'année dernière: une initiative qui engage non seulement le gouvernement mais la société québécoise toute entière, et dont les grands principes doivent constituer la pierre angulaire de nos politiques à l'égard des communautés issues de l'immigration.

Lors des dernières consultations qui ont entouré la détermination annuelle de nos niveaux d'immigration, la dimension humanitaire de nos politiques et règlements a toujours reçu un appui unanime de la part des citoyens et groupes sociaux impliqués; tous y voyant une responsabilité majeure pour le Québec sur le plan international. Une responsabilité d'autant plus grande que nous appartenons à l'une des collectivités les mieux nanties au monde et que nous avons la chance de vivre dans un pays où les institutions et les traditions démocratiques garantissent l'exercice des droits fondamentaux de la personne. De tels faits doivent être rappelés ici car ils permettent de situer notre générosité à sa juste place et de relativiser les mérites qui s'y rattachent.

Ils me permettent aussi, en terminant, de vous faire part de certains aspects qui me paraissent contradictoires dans notre conception actuelle de l'immigration humanitaire.

En effet, si l'on reconnaît, dans bon nombre de pays et en particulier, dans les pays occidentaux, le droit qu'a toute personne de circuler librement et de choisir sa résidence à l'intérieur d'un état, aucun pays n'a toutefois érigé l'immigration sous forme de droit. On admet, certes, parmi les libertés fondamentales de la personne, le droit de quitter tout pays, y compris le sien, et de revenir dans son pays, mais ce droit à l'émigration n'implique pas son corollaire, le droit à l'immigration. Partout, l'existence des États-Nations, des frontières, des législations et réglementations visant à encadrer l'accès au territoire national, et jusqu'à l'existence de débats sur le caractère plus ou moins libéral que devrait revêtir cet encadrement, tout confirme cet état de faits.

L'immigration humanitaire correspond donc à deux ordres de phénomènes. Au niveau des individus en cause, il s'agit de l'exercice du droit de quitter un environnement devenu hostile, inhospitalier, pour rechercher les conditions nécessaires à leur survie et à leur épanouissement. Mais pour le pays de refuge, l'exercice, par un grand nombre d'individus, de ce droit de circulation devient un phénomène collectif, un mouvement migratoire plus précisément, qu'il voudra canaliser et contrôler, en fonction de sa générosité du moment, certes,

mais également en fonction des bénéfices qu'il estime pouvoir retirer, à plus ou moins long terme et aux plans économique, démographique et culturel, de l'ensemble de sa politique migratoire.

On me permettra d'illustrer cette contradiction par un exemple concret. J'ai déjà fait allusion à la présence chez nous d'un grand nombre de revendicateurs du statut de réfugié. J'ai parlé d'environ 20 000 pesonnes au Québec; de 40 000 pour tout le Canada. On a beaucoup discuté, ces dernières années, des diverses questions soulevées par ces candidats au statut de réfugié.

S'il est vrai qu'un certain nombre d'entre eux sont d'authentiques réfugiés au sens de la Convention de Genève et du Protocole des Nations Unies, il est assez évident qu'une bonne part correspond aussi à d'autres types d'immigration, notamment à celui provoqué par les inégalités économiques qui hantent notre planète et par son corollaire, le déséquilibre démographique entre pays riches et pays pauvres. Partant de ce phénomène, c'est un véritable mouvement migratoire qui est en train de se créer, un mouvement dont on ne connaît pas toutes les dimensions mais sur lequel il faut avoir le courage de s'interroger quand on aborde la question de l'immigration humanitaire.

Nos interrogations découlent d'un souci bien légitime d'équité et portent en fait sur le droit des personnes véritablement en danger à chercher refuge chez nous. Elles tiennent compte non seulement du phénomène des revendicateurs qui se présentent à nos frontières mais aussi de la présence obsédante de quelque douze millions de réfugiés à travers le monde pour lesquels l'immigration parait une solution bien improbable. En effet, en supposant que l'immigration soit souhaitable pour toutes, je me demande à combien de ces personnes nous serions disposés à accorder le «privilège» de s'installer chez nous? Cette question, bien que théorique, permet d'entrevoir les limites de l'immigration comme solution aux désordres et aux déséquilibres de notre planète. Elle nous permet aussi de saisir les limites de moyens d'intervention isolés ou trop mécaniques.

Même s'il est décidé à poursuivre sa politique de générosité à l'égard des réfugiés et des personnes en situation de détresse, le Québec est bien conscient de la dimension mondiale des problèmes en cause et de la nécessité de recourir à la solidarité internationale pour trouver des solutions.

Ces programmes témoignent bien, à mon sens, d'un des rôles indispensables de la solidarité internationale par rapport à la question des réfugiés. Cette solidarité, toutefois, mériterait aussi d'être mise à contribution dans la recherche de solutions s'attaquant aux sources même du problème, à ses causes économiques, démographiques et politiques qui entraînent inévitablement un déséquilibre croissant entre pays riches et pays pauvres et qui

favorisent l'éclosion de régimes totalitaires et dictatoriaux où les droits humains fondamentaux sont bafoués quotidiennement. Un problème à la fois économique et politique dont l'évolution semble suivre un cycle implacable que d'aucuns, comme s'il n'y avait plus d'espoir, ont comparé au rocher de Sisyphe.

Ce n'est pas mon avis toutefois. Même si le constat demeure démoralisant, je pense, en effet, qu'il pose à notre planète et à la civilisation actuelle des défis de taille qui concernent à la fois les gouvernements et les populations et qui ne pourront être relevés qu'après de nombreuses remises en question où il faudra faire preuve de courage et d'obstination.

Je suis convaincue que des assises comme celles-ci contribuent à relever ces défis en favorisant la circulation et le développement d'idées et de projets qui permettent d'apporter un peu de lumière dans ce monde de contradictions qui est le nôtre.

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Refugee Status in Canada

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Although concepts of human rights, asylum and humanitarian intervention had existed from time immemorial, the world was singularly unprepared for the genocide of World War II and the refugee crisis that followed it and that was exacerbated by revolutionary changes in eastern Europe that proved unacceptable to a considerable portion of the population. Europe filled with refugees who spent years in transit camps awaiting permanent resettlement. The problem was ultimately solved in part through the creation of the State of Israel, in part through an opening of many western countries, especially the United States, Canada and Australia.

In 1951, a refugee convention was adopted, defining the concept of refugee but limiting it to those displaced by the dramatic events in Europe in the period 1933-1945.[1] By 1967, optimism about the temporary nature of the problem had disappeared; a protocol was signed extending indefinitely the validity of the definition.[2]

Canada is a signatory to both the Convention and the protocol. That means that respecting the definition of refugee is part of our international obligations.

It is the purpose of this essay to see how Canada has fared in fulfilling its obligation and in the wider field of assisting the displaced and the persecuted.

International Law

It has long been a principle of common law[3] that international law is not automatically part of municipal law,[4] save as a presumption.

In Lanigan's *Maxwell on the Interpretation of Statutes*[5] we read at page 54:

> International Conventions may not be resorted to for the purpose of interpreting legislation which does not contain any ambiguities.

At page 183 the following is added:

> But if the language of the Statute is clear, it must be followed notwithstanding the conflict between municipal and international law which results . . .

This position is firmly established by British and Canadian jurisprudence. It suffices to cite *Cellco Dealings Ltd.* v. *I.R.C.*,[6] *Foreign Legations Case*,[7] *Reference re Exemption of U.S. Forces From Canadian Criminal Law*,[8] *Rose* v. *The King*[9] and *Schavernoch* v. *F.C.C.*[10] to see how little doubt exists about the supremacy of municipal law.[11]

In Canadian refugee law, the Federal Court unambivalently applied this principle in *Minister of Manpower and Immigration* v. *Fuentes*[12] at page 338:

> Consequently the fact that the Immigration Appeal Board Act refers to the United Nations Convention relating to the Status of Refugees does not have the effect of incorporating into Canadian domestic law the prohibition contained in that Convention against deporting refugees. Accordingly a deportation order is not invalid merely by virtue of the fact that it was made against a refugee protected by the Convention.

The only doubt exists as a result of the split decision in *Ernewein* v. *M.M.I.*[13] in which Mr. Justice Pigeon disagreed with the *Fuentes*[14] principles and favoured a larger role for international law. He was in the minority, and his views could be assumed to be a mere dissent were it not for the fact that on the ratio of the case,[15] the Court subsequently changed its mind and adopted Mr. Justice Pigeon's view.[16] It may now be that some re-evaluation of the traditional position is feasible through Mr. Justice Pigeon's dissent.

It is suggested, however, that such a re-evaluation is not necessary. Even if it is not automatically domestic law, international

law has the undisputed status of a powerful tool of interpretation of ambiguous laws. Given this and given the broad significance attached to section 7 of the Charter of Rights and Freedoms by our courts,[17] in almost all cases, international law could be given effect.

Mr. Justice Pigeon, in his capacity as legal author, put this as follows in *Rédaction et Interprétation des Lois*[18] at page 53:

> Si le statut comporte la dérogation [from international law] le tribunal doit l'appliquer, mais il faut que l'intention soit clairement exprimée.[19]

It therefore follows that the Federal Court of Appeal was right in the bare statement of law in *Fuentes*,[20] but wrong in failing to find a way to apply international law anyway, through Canadian legislation.[21]

In fact, the *Immigration Act 1976* is full of provisions that would justify concluding that almost all of the Convention was incorporated. Article 2 defines "Convention refugee" in the same terms as the convention. Article 3 (g) makes one of the fundamental purposes of the law:

> to fulfill Canada's international legal obligations, with respect to the displaced and the persecuted.

Article 4(2) gives special rights to remain in Canada to most Convention refugees. Article 6(2) facilitates the entry of refugees into Canada. Article 55 restates our obligation to avoid *refoulement*.

It does not take any liberties with the law to conclude, contrary to *Fuentes*,[22] that international law is in force in Canada, not because of any automatic application of it but because it was enacted into domestic law and no "clear derogation"[23] was included.[24]

The Domestic Definition of Refugee Status

We have seen that Canada explicitly respects the definition of "refugee" in the Convention. It is, however, surprising to see that Canada, which frequently prides itself on its generosity, would insist on the minimum definition provided by international law.

There are unquestionably many different definitions of refugee possible.[25] The Convention one is a rather hard one, requiring well-founded fear of persecution on named grounds only. The only relatively liberal aspect of this is that one need not prove the persecution, only a well-founded fear of it.[26] The other requirements are very onerous indeed.

First, the use of "persecution" makes it clear that mere discrimination does not suffice.[27] Unquestionably, minor discrimination (e.g., affirmative action) does not turn its victims into refugees. However, the line is very difficult to draw when it comes to serious matters. Are the Chinese population of Malaya and Indonesia persecuted? Is it persecution to deny someone access to a rewarding career? Is forced assimilation tantamount to persecution?[28] One can understand government reluctance to open doors through which millions might enter.[29] Nevertheless, the Convention does not mention that the persecution must be extraordinary and limited to a few persons.[30] The law must be given effect regardless of the statistical consequences.

This author has already noted the problem of self-induced refugee status.[31] In some cases, the mere making of a claim may turn an ordinary citizen into a refugee if his government punishes such attacks on itself.[32]

It is submitted that as long as a person fits the definition, the manner in which he came to fit it is irrelevant. Anyone who is a refugee because of political opinion undoubtedly made a personal choice at some time to engage in political speech, writing or action. This act of past free will does not take away his status.

Some may find it inappropriate for certain people to receive refugee status solely because of statements made in Canada with the result in view. It must not be forgotten, however, that the consequences of returning such people to their countries of origin are often as drastic as those for any other refugees, and human life and dignity must come before all notions of procedural propriety. Moreover, one can never tell when their declarations are dictated by a desire to stay in Canada and when they are prompted by genuine conscience.

There is in principle little difference between the person who says "The Chilean police are looking for me" and one who affirms that his conscience will force him to do or say things that will have the same effect in the near future.[33] Yet until recently, the second person stood very little chance of success in obtaining refugee status in Canada.

Two recent Immigration Appeal Board cases, *Lapaj* v. *Minister of Employment and Immigration*[34] and *Albert* v. *M.E.I.*,[35] show a greater flexibility. The Board was willing to take into account John Rawls's concept of "conscientious refusal"[36] in order to determine claims to refugee status.

Claims based on an individual's conscience would seem to fit a western, individualistic jurisdiction like Canada. One can appreciate that a person with no moral choice might have a genuine fear of

returning to the place where he will be morally forced to act to his detriment.[37]

Despite the recent hints of improvement, the degree of danger to him that an applicant must demonstrate remains a vague and potentially dangerous question of law.

The grounds of persecution are an even more controversial topic. It cannot be doubted that many other criteria could be equally compelling. Sex and sexual orientation are obvious candidates.[38]

Even more significant is the fact that war, military service and civil strife are left out of the list. Courts have not been disposed to read them into the five categories.[39] Yet these are grounds that prompt many to seek refugee status and that give them some confidence that they will succeed.

Victims of ethnic strife whose plight can be attributed to other groups but not to their government fail to qualify. The application of this to Lebanon is evident.

Finally, persons exposed to frightful penalties for petty crimes[40] are left without formal protection.

It is possible to interpret "social group" very liberally to include such things as sex or sexual orientation. Intellectual gymnastics may permit one to consider persecution for adultery in an Islamic country to be religious persecution. There has, however, been no sign that Canadian courts are prepared to torture the text of the definition in the interests of justice.

What is really needed is a power to grant relief notwithstanding that the definition is not met. The minister has administrative powers, but no court has jurisdiction to interfere with this exercise of discretion.

Prior to 1978 the Immigration Appeal Board had this power; unfortunately, this last-ditch power to relieve was inexplicably lost in the new act.[41] Such a power should be restored. If it existed, an amendment of the definition would be less urgent, and one could no longer criticize Canada for adopting the international *minimum* protection as its standard.[42]

The Procedure of Refugee Determination

No definition of refugee will do anyone any good unless a method is provided for asserting rights under the definition. Canada's procedure has been the subject of more criticism than the definition. It certainly merited that criticism prior to the *Singh* case.[43] It is submitted that with *Singh*[44] the procedure became quite commendable by international standards. We shall examine later the effect of the proposed new legislation.

It is clear that, if the refugee definition is to have any meaning, a fair and reasonable procedure must determine who succeeds and who fails. In that one must not confuse refugee status with general liberalism in immigration matters.[45] If refugees are to be protected, one cannot say that everyone must succeed, whatever other doors one might open for those whose claim is rejected. It would be as much a subversion of refugee protection to extend it to all who ask, as to deny everyone systematically.

Fairness in a system of determination means the opportunity for the applicant to put forward his claim and to try to convince the decision-maker.[46] Does the present system fulfil this requirement?

It certainly provides for a reasonably acceptable administrative procedure leading to a ministerial decision followed by a fully judicial redetermination by the Immigration Appeal Board, which is a court of record.

Two problems existed before *Singh*.[47] The first dealt with the screening procedure of section 71 of the *Immigration Act 1976*, which ordered the Board to refuse to hear any case that did not, first, establish a *probability* of victory.[48] This rule led to much injustice. This writer wrote:

> However, misgivings about the result were present at all levels. This is not surprising because the jurisprudence left the possibility of injustice open at all times. If people with a one-third chance of winning are to be denied a hearing and removed, it is mathematically likely that one in three of them will be a genuine refugee. Since refugee status is, along with extradition, one of the last areas of law where matters of life and death routinely arise, it is particularly invidious that this area should be dealt with in a summary and indeed random manner.[49]

The *Singh*[50] case completely solved the problem by ordering the Board to hear every case, notwithstanding section 71.[51] Thus every applicant was guaranteed at least one oral, judicial hearing. This put Canada at the top of western countries in its procedure.

The *Singh* decision did more than order hearings. It showed that the Supreme Court was not prepared to follow the excessively technical and restrictive jurisprudence of Federal Court[52] or to give narrow interpretations of right in a field in which life was at stake.[53] In short, the decision stood not only for a point of law, but for an attitude with respect to claims to refugee status.

The second great issue that had received unfavourable comment was the *Immigration Act*'s seeming restriction of the right to claim refugee status to persons undergoing inquiry who otherwise would

have to be removed.[54] It does not seem quite consistent with common sense or our international obligations that a person cannot be considered unless he runs the risk of being removed and unless he is actually found to be in Canada illegally.

Singh[55] provided an opportunity to escape the straitjacket by creating a constitutional right to apply for refugee status.[56] One could well argue that there had to exist a right to apply for any person, regardless of status. The Federal Court's reaction has been mixed. *Tonato* v. *M.E.I.*[57] provided a well-reasoned justification of the liberal position. Another trend of jurisprudence, far less clearly argued but with some Federal Court of Appeal approval, points in the opposite direction.[58] Falardeau-Ramsay described the jurisprudence as follows:[59]

> The Singh decision, with its emphasis on the need for oral hearings, has also expanded the remedies available to persons claiming refugee status other than during an inquiry. Based on *Tonato*, a person who is legally in Canada, who is not the subject of an inquiry and who has made a claim to refugee status that has been refused now has access to the Immigration Appeal Board. *Tonato* does not address the question of initial access to the refugee determination process, but in a subsequent case (*Lokeka*) the Court said that refugee status could only be claimed in the course of an inquiry. *Tonato* was not mentioned, no *Charter* arguments were discussed,[60] nor is it clear from the reasons that the applicant ever went through an inquiry.

There is nothing to be said in favour of the *Lokeka*[61] view. What is an absurdity in the case of legal visitors who have to commit an illegal act[62] with possible penal sanctions in order to apply, can be a great danger to holders of ministerial permits or persons under deportation order who may *never* be able to apply. One can imagine a person who is subject to removal for overstaying his visa and learns of a coup d'état that has transformed him into a refugee. He would have no remedy.[63]

The law is obviously unclear. The solution is either an appeal to the Supreme Court in the hope that it will dispel all doubts by a generous ruling, or legislation to assist claimants.

An issue seemingly unrelated to procedure but in fact inextricably linked to it is the facilities for subsistence given to claimants. Unless all claims are finally decided within a week or so,[64] a person who has made a claim to refugee status must be given financial assistance or an opportunity to work. In the past, with some exceptions, Canada has understood this and granted work permits.[65]

Every several months, however, there is an attempt by the government to be harder about this. At present, the regulations are being tightened.[66] One can only describe any attempt to make it economically difficult or impossible to claim refugee status as highly regrettable.[67]

The conclusion on Canadian procedure, following *Singh*[68] and before the amendments now in the process of being passed,[69] is that the procedure is by and large satisfactory except for its restriction of employment of those undergoing inquiry. The definition of refugee and the absence of broad remedial powers is a far more serious problem. It is ironic that most of the protests against government policy have centred on the procedure rather than the substance.

Current Legislation

1987 was not a good year for refugees. The arrival of a shipload of illegal Sikh claimants, following groups of improbable pretenders from Turkey and Portugal,[70] set off a panic, both in the Canadian government and in the public. Groups of several hundred were likened to "waves" of applicants. Elements of racism, which had never died down, came to the fore. Few people asked themselves serious questions about the claimants or about themselves in a similar situation.[71] This attitude was not new in Canada,[72] but it was surprising to see it so open, especially in view of Canada's constant claims to great generosity.[73]

The government decided to bring in legislation to limit the opportunity to claim refugee status. From the start, the department of Immigration made it no secret that it was dissatisfied with *Singh*[74] and had been working on a solution less procedurally generous than that imposed by the Court. Now it added the perceived need to stop "queue-jumping" to the list of reasons for legislation.

The "queue-jumping" is explained by the fact that most immigrants have to apply for visas *outside* the country, but most refugee status claimants arrive here and then make the claim. The argument against "queue-jumping" would be somewhat stronger if a queue in fact existed. But most immigration applicants are accepted or refused[75] within a relatively short time. There is no list of people waiting for a "place" to become vacant. It is therefore difficult to see over whom refugee claimants are "jumping".

However, the argument against frivolous claimants is by no means without merit. Undoubtedly many bogus claims have been made.[76] Frivolous claimants have stayed and worked in Canada for many years; some ultimately had to be permitted to remain because of marriage or other compelling personal grounds. Moreover, there is

nothing improper about weeding out frivolous applications. In his Comment on *Singh*[77] this author wrote:

> It would probably be incorrect to suggest that no way of dealing with purely frivolous appeals was possible in Canada's constitutional context. It is quite conceivable that if *Kwiatkowsky* had imposed less stringent requirements for a hearing, *Singh* would have been differently decided. Many courts, whether first instance or appellate, have provisions for dismissing dilatory, frivolous, or abusive cases. Even where life, liberty or security of the person is concerned, such provisions are not necessarily unconstitutional so long as they are limited to things manifestly untenable. It was the breadth of section 71 which made it dangerous and led to its undoing.[78]

The issue is therefore not whether there is justification for legislation, but whether the proposed legislation stays within the limits of eliminating only the manifestly hopeless applications.

The transitional measures taken before the panic created a partial amnesty[79] and a "fast track" to allow the remaining applications to proceed quickly. No one could contest any of these measures.

However, after the panic started, a policy was initiated of returning claimants crossing the U.S. border to the United States, until such time as the inquiry can be scheduled. This is done without an absolute guarantee from the United States that it will not return them to countries where they may be in peril, even though the United States, which has signed only the 1967 protocol and not the Refugee Convention, has been known to deport refugees from extreme-right regimes. If we apply the basic principle that, in law, one cannot do indirectly what one cannot do directly, we shall conclude that this practice violates our international obligation to eschew *refoulement*, as well as section 55 of the *Immigration Act 1976*.[80]

The law now before Parliament appears to close off a number of loopholes favourable to claimants.[81] It also presents a number of new difficulties to the claimant.

First, a conditional removal order will now be pronounced before the claim is made. This means that as soon as a negative determination is made, the person will be subject to immediate removal. At present, there is a delay, because the order must be made. This appears much more fair.[82]

The most radical change comes in the inquiry and claim procedure. A subject of an inquiry will now have to indicate at once whether he intends to claim refugee status. A member of the Refugee

Division will be present for the rest of the inquiry if he does. Persons entering from the United States may still be ordered to return there without guarantee until the inquiry can continue.

The adjudicator and member of the Refugee Division will make a preliminary determination of whether the applicant is eligible to apply and whether he has a credible basis for the claim. The burden of proof will rest on the applicant, but if he convinces one of the two judges, that will suffice.

It would seem that, except for the *refoulement* to the United States, discussed above, there is so far no inconsistency with the *Singh*[83] decision because an oral hearing before the judges is given to the applicant.

On the other hand, the rules of eligibility contained in the new section 48.1 give great cause for worry. A person recognized as a refugee in another country (so long as he is not a refugee from *it*) will no longer be able to make a claim. This reverses *Hurt* v. *M.M.I.*[84] and ignores the reality that many countries bordering on crisis spots in Asia, Africa or South America, may be able to offer asylum in the strict sense but not means of subsistence or the opportunity of integration. Such asylum will not, in the long run, save the individual.

Even more suspect is the creation of a class of "safe third countries", which will undoubtedly include such places as the United States, which is notoriously unsafe for left-wing refugees. It will be impossible to apply for refugee status in Canada from these countries, regardless of the facts of the case. The list of countries is not yet ready, and it may be that the government will prove more subtle than this writer suspects, but one can hardly imagine a Canadian government openly refusing to trust the United States and excluding it from a list of "safe countries."

Finally, a person who has previously been refused refugee status or has not left the country following a departure notice will be ineligible. This restriction is an absurdity. A person who has not left may have good grounds for his acts, grounds that arose subsequent to his inquiry. The risk of returning people to persecution is too great to justify technical restrictions.

In the matter of "credible basis" it is far from clear that only frivolous claims will be dismissed. It is submitted that any claim should be deemed *a priori* credible, so long as it is not frivolous or preposterous.[85] Otherwise, pre-*Singh*[86] injustices[87] will surface again.

A new Refugee Division is set up to consider those applications that survive the initial filtering. There appears to be no evident injustice in the procedure before this Division. The most ominous provision is the one requiring leave to make a section 18 or 28

application, without appeal if leave is refused. This means that in practice, in all of immigration law there will be no judicial review except in the most glaring cases.[88] One wonders if any remedy will lie before provincial Superior Courts.[89] Unless that speculative possibility is realized, there will be virtually no recourse from the exercise of extraordinary power over individuals by public servants. This is inconsistent with our entire tradition of public law.

With respect to refugee status, there will be no remedy from peremptory decision declaring claimants ineligible or without a credible basis. Such persons will be left helpless under the law.

It would be unfair to dwell only on the bill's shortcomings and not to mention its strengths, even if these strengths are clearly overshadowed by the injustices.

The bill at last creates a clear right for persons lawfully in Canada to claim refugee status.[90] It provides for an automatic stay of execution where an appeal has been taken to the Federal Court.[91] It provides an easy method for landing successful claimants of refugee status. These improvements are commendable and should not be ignored. On the whole, however, the bill appears to be an over-reaction[92] to a minor problem, and it casts doubt on our ability to live up to international obligations.[93]

Bill C-84

One of the more remarkable aspects of the new Canadian legislation is the proposed statute known as Bill C-84, which criminalizes many acts that could be viewed as assisting or encouraging refugee claimants.

The bill is not only a law about refugees. It purports to include not only the protection of persons "in genuine need of protection" and the control of abuse of the refugee determination process, but also to encompass discouragement of the smuggling of persons and the respecting of security concerns.

The purposes are less than frankly stated. Nothing in the bill assists genuine refugee claimants in any way. On the other hand, the other purposes are pursued with excessive zeal.

The law (section 8) would allow the Minister of Immigration to stop ships outside Canada's internal or territorial waters if the Minister believes, on reasonable grounds, that persons are being smuggled in them. This evokes the memory of shiploads of refugees from Nazi Germany wandering aimlessly on the high seas. It also raises serious doubts about our commitment to international law.

Even more disturbing is section 9, which provides penalties for persons who "organize, induce, aid or abet" persons to enter Canada without proper travel documents. Many genuine refugees lack travel

documents. It seems perverse to punish persons who assist others in asserting a claim recognized by Canadian law. One may once again speculate about Canada's seriousness with respect to its commitment to comply with the Refugee Convention and consequently with international law.

Section 9 also provides punishment for those who "induce, aid or abet others to make a false or misleading statement" with regard to a refugee status claim. Perjury is already an offence described in the Criminal Code. Since refugee claims are made under oath, no further law is needed to outlaw false statements. What, then, is the purpose of the new provision?

Either it extends to statements not made under oath, for example at press conferences, in which case it seriously limits freedom of expression, or the word "misleading" is pushed to the extreme and then includes such things as lawyers' customary preparation of their clients. It is not necessary to repeat that it is a lawyer's duty to counsel clients to tell the *truth* but also to assist them in presenting it in a favourable light. Whether the new section is an attack on freedom of expression or on the right to counsel, it is thoroughly reprehensible and is open to attack under the Charter.

There is even a possibility that helping persons who have made a groundless or seemingly groundless claim, in a manner unconnected with the claim (e.g., providing food or shelter), might be interpreted as aiding them to make a false claim. This is so even though false refugee claimants may, and often do, have excellent humanitarian cases for relief and even though they may be hungry and may have helpless dependents. Surely such a law is utterly incompatible with the spirit that animated Canada when it adopted the Charter, whether or not the Charter itself is directly violated here.

It is unnecessary to dwell in more detail on Bill C-84. Bill C-55, the principal new immigration law, is difficult to excuse, especially its most draconian features such as denial of access to the courts. However a rational explanation for that law is possible in the context of a "free and democratic society". Bill C-84 is simply beyond the pale and must be scrapped in its entirety.

Conclusion

Although Canada's record with respect to refugees is not as extraordinary as Canadians have recently claimed, it has been generally good since World War II. The law, without Bill C-55, has many lacunae and weaknesses but, so long as *Singh*[94] stands, is quite acceptable.

The new bill raises worrisome spectres of pre-1945 Canada. It is unlikely that the legislator intends to return to the Mackenzie King

epoch.[95] Rather there appears to exist a growing influence of bureaucrats who wish to retain in their administrative hands as much power as possible to grant relief and balk at giving enforceable rights to applicants or wide jurisdiction to courts. It may be that in many worthy cases, relief will be granted,[96] but this will be a matter of grace, not right.

This concentration of power is contrary to the basic trends of public law, which has as its main purpose the fracturing of power into so many small pieces that no one has an inordinate share.

Unless the world changes with unexpected rapidity, refugee problems will be with us for many decades. These cases raise questions more drastic than those that appear in most areas of law – life, death, freedom, dignity, right to a decent livelihood. Problems of such magnitude require reasonable access to courts and to several layers of decision makers. As in criminal law, a single error unfavourable to an individual has such drastic consequences that a thousand errors the other way are a preferable risk.

It is particularly distressing to see that real or imaginary loopholes favourable to applicants are quickly sealed, but loopholes or omissions favourable to the government are extremely difficult to remove even if they are strikingly unfair.

It would be impossible, and indeed improper, to allow all claims to refugee status. But in both the disposing of claims and the drafting of legislation one should consider the words of J. Smithers, an Australian judge, in *Ates* v. *Minister of State for Immigration and Ethnic Affairs*:

> But in the administration of good government there is not only room, but a legal duty, to consider, even on occasions with compassion the circumstances of particular cases . . . The law must be administered by the Minister in the best interest of Australia; so to do extends to Australia's interest broadly regarded and embraces, on occasion and according to circumstances, the taking of decisions by reference to a liberal and even compassionable outlook appropriate to a free and confident nation and conscious of its reputation as such.[97]

These words apply to Canada's immigration law and policy as much as to Australia's.[98] It is to be hoped that despite recent problems this will be heeded in the future.[99]

Notes

1. It is possible that in 1951 many states, including Canada, would not have accepted a definition opening the door to Asian or African immigration.

2. For a history of this see G.S. Goodwin-Gill, *The Refugee in International Law* (Oxford: 1983).

3. Common law is a system of law that Canada inherited from Great Britain; hence, Canada is a common law country, as is England of course and Australia, for example.

4. In international law one refers to the particular laws and constitutions governing each country or state as municipal law.

5. Lanigan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: 1969).

6. (1962) A.C. 1.

7. (1943) S.C.R. 208.

8. (1943) S.C.R. 483.

9. (1947) 3 D.L.R. 618 (Que. C.A.).

10. (1982) 1 S.C.R. 1092.

11. Save that, in England, European Community law now enjoys special status. See T.C. Hartley, *The Foundations of European Community Law* (Oxford: 1981), c. 7.

12. (1974) 2 F.C. 331 (Fed C.A.).

13. (1980) 1 S.C.R. 1092.

14. *Fuentes*, supra fn 12.

15. Whether leave to appeal lies from a refusal of leave to appeal by a lower court.

16. *Macdonald* v. *City of Montreal* (1986) 1 S.C.R. 460.

17. *Singh* v. *M.E.I.* (1985) 1 S.C.R. 177, *Reference re Sec. 94(2) of the B.C. Motor Vehicles Act* (1985) 2 S.C.R. 486, *Mia* v. *Medical Services Comm. of B.C.* 17 D.L.R. 4th 385 (B.C.S.C.).

18. Quebec, 1978.

19. Since the writing of Pigeon's text, the Charter has added fresh arguments to the fulfilment of international obligations in refugee law.

20. *Fuentes*, supra fn 12.

21. Upon reflection, in view of the collectivist thinking often displayed by the Third World majority on the international field (e.g., the doctrine of self-determination of peoples as a "right"), it is perhaps best to leave a final safety valve in local parliaments. That, however, is no excuse for failing to live up to international obligations.

22. *Fuentes*, supra fn 12.

23. In the words of Pigeon, supra fn 18.

24. See also J.H. Grey, *Immigration Law in Canada* (Toronto: 1984) at pp. 130-132.

25. See Goodwin-Gill, *op. cit.*, fn 2 c. 1.

26. See *Kwiatkowsky* v. *M.M.I.* (1983) 142 D.L.R. 3d 385 (S.C.C.) where Madam Justice Wilson, although she dismissed the appeal, made it clear one could not ask for more than the well-founded fear. See also *Mohamed Saddo* no 1 M80-1123 (Fed C.A.) unreported judgement and no 2 (1981) 126 D.L.R. 3d 764 (Fed C.A.). In these cases the Federal Court of Appeal pointed out that newspaper articles about a person's homeland, while they may be hearsay about the possible persecution, are direct evidence creating "well-founded fear" of it.

27. See *Kwiatkowsky*, supra fn 26.

28. See Grey, *op. cit.*, fn 24 at pp. 126-127 for a discussion of some of the problems with the definition.

29. For instance, could the entire black population of the United States have entered Canada if these norms had been applied prior to 1954?

30. If this were 1942, all European Jews would undoubtedly qualify.

31. Grey, *op. cit.*, fn 24 at pp. 126-127.

32. This problem is exacerbated by revelations that applications are not securely confidential.

33. The person already in trouble will, however, have an easier task from an evidentiary view point.

34. I.A.B. M 86-1602.

35. I.A.M. M 87-1554.

36. See Rawls, *A Theory of Justice* (Oxford: 1972).

37. That is, Antigone would surely be a refugee under modern Canadian law.

38. Most if not all modern human rights charters prohibit discrimination on account of sex; Quebec also includes sexual orientation.

39. See *Darwich* v. *M.M.I.* (1979) 1 F.C. 365. In Grey, *op. cit.*, fn 25 at p. 125, there is a discussion of this problem. See also *Boulis* v. *M.M.I.* (1974) S.C.R. 875; *Musial* v. *M.E.I.* (1982) 1 F.C. 290 states that in special cases an individual threatened with a desertion charge may be a refugee.

40. Or no crimes at all (e.g., adultery).

41. See Grey, "The New Immigration Law: A Technical Analysis", *Ottawa Law Review* 10/103 (1978), pp. 106-107.

42. Sections 3(g) and 6(2) of the *Immigration Act 1976* show that the legislator did not mean to exclude protection of "near-refugees." Section 6(2) has been used to assist persons from countries in crisis (e.g., Indochina, Iran). However, the government has clung to political control over selection of entrants. An extension of judicial review would be proper here.

43. *Singh* v. *M.E.I.*, supra fn 17.

44. *Singh*, supra fn 17.

45. Which, incidentally, this writer shares. See Grey, *op. cit.*, fn 24 at pp. 161-163 and 11-15.

46. Fairness has now acquired a tremendous and justified vogue in administrative law. See Mullan, "Natural Justice" in *Recent Developments in Administrative Law*, Finkelstein and Rogers, ed. (Toronto: 1978) at p. 1, and Grey and Casgrain, "Jurisdiction, Fairness and Reasonableness", *Dalhousie Law Journal* 10/89 (1978).

47. *Singh*, supra fn 17.

48. This interpretation was upheld in *Kwiatkowsky*, supra fn 26.

49. Grey, "Comment on Singh v. Minister of Employment and Immigration", *McGill Law Journal* 31/496 (1986), p. 499.

50. *Singh*, supra fn 17.

51. Half of the Court applied section 7 of the Charter and half used the old, unentrenched Bill of Rights.

52. See Grey, *op. cit.*, fn 45 at p. 494. See also Grey, "Immigration Law: The Courts and Humanitarian Considerations", February 14, 1986, Proceedings of the Canadian Bar Association *Colloque Sur Les Considerations Humanitaires eu Matière d'Immigration*.

53. See Falardeau-Ramsay, "Recent Developments in Immigration Law" in *Recent Developments in Administrative Law*, fn 46, especially at pp. 249-250. It is particularly important to remember that in *Singh*, supra fn 17, Madam Justice Wilson stressed that administrative convenience is no excuse for violating law rights. In the past arguments of convenience had had some success.

54. It was possible to interpret the act differently but in *Re Mohammed (and M.E.I.), Re Abate and (M.E.I.)* (1982) 130 D.C.R. 3d 481 aff'd in 141 D.L.R. 3d 384, the Federal Court interpreted these sections in a narrow way despite the potential for great hardship. See Grey, *op. cit.*, fn 21 at pp. 109-110. The department relieved applicants by holding informal refugee

hearings outside inquiry but such applicants had no right to redetermination or to a temporary work permit.

55. *Singh*, supra fn 17.

56. Even though refugee status was, of course, not a right.

57. *Tonato* v. *M.E.I.* (1985) 1 F.C. 925.

58. See *Lokeka* v. *M.E.I.* (1986) 6 F.T.R. 85 affirmed without comment by the Court of Appeal A-485-80. See also *Mercier* v. *M.E.I.* F.C. T.D. T-2831-86 and *Bendahmane* v. *M.E.I.* T-2642-86.

59. Falardeau-Ramsay, "Recent Development", fn 53 at p. 249-250.

60. For this reason, this writer would claim that the *Lokeka* case (supra fn 54) was decided *per incuriam* and should not be followed. See Pigeon, *op cit.*, fn 15 at p. 47 for a discussion of the concept of *per incuriam*.

61. *Lokeka*, supra fn 58.

62. e.g., overstay; work illegally.

63. Especially since the Federal Court has held consistently with the tenor of its jurisprudence in immigration matters that a desire to make a claim to refugee status is not a valid ground for reopening an inquiry: *Ramnarain* v. *M.E.I.* A 651 - 81 (Fed C.A.).

64. And such rapidity would undoubtedly affect the reliability of the result.

65. See Grey, *op. cit.*, fn 24 at pp. 120-123.

66. For instance the result of *Afshar and Djahangirian* v. *M.M.I.* T-1980-82 has been reversed through a regulation stating no work permit should be issued until the sworn statement.

67. The effect of refugee claimants on unemployment is, in any case, negligible.

68. *Singh*, supra fn 17.

69. These will be discussed below along with the immediate measures that were adopted to slow down the flow of refugees.

70. Sikhs, who were the ultimate cause for the panic, are a group among whom many genuine refugees might realistically be found.

71. See Grey, "Are Canada's Refugee Requirements Too Demanding?", the Montreal Gazette, August 17, 1987, for this writer's view.

72. See Abella and Troper, *None is Too Many* (Toronto: 1982).

73. Since 1945, those claims were often justified.

74. *Singh*, supra fn 17.

75. Usually the latter.

76. See Grey, *op. cit.*, fn 24 at p. 122.

77. *Singh*, supra fn 17.

78. Grey, *op. cit.*, fn 45 at p. 501.

79. But the word "amnesty" was carefully avoided.

80. There have been no test cases.

81. For instance, at present once a person is declared a refugee, a political change in this country that eliminates his fears does not affect his status. The new law will justifiably change this. But one may fairly ask why the opposite situation – that of a person who becomes a refugee because of events subsequent to a deportation order pronounced against him – has not been considered.

82. Under the new law a claimant who believes his inquiry to be irregular for any reason independent of refugee status will probably have to pursue his Federal Court remedies at the same time as refugee status, despite the additional cost and bother.

83. *Singh*, supra fn 17.

84. (1978) 2 F.C. 340.

85. This may be achieved through jurisprudence.

86. *Singh*, supra fn 17.

87. See supra fn 45 and the quotation reproduced there.

88. The Federal Court jurisprudence on leave under the present section 84 is not encouraging.

89. See *Crevier* v. *A.G. Que.* (1981) 2 S.C.R. 220.

90. It is a pity that persons under removal orders who face even greater peril are granted no relief.

91. Although the leave provisions make this a dubious gain for applicants.

92. Even where the bill has a valid justification, as with frivolous claims, it uses language far too wide and too open-ended.

93. Undoubtedly, the bill's validity will be tested under section 7 of the Charter and section 96 of the Constitution. Other sections of the Charter may also play a role, as might the international obligation not to engage in *refoulement*.

94. *Singh*, supra fn 17.

95. Evidence against this can be found in the overly cautious but nevertheless real increase in immigration numbers and in the guarantees the present law and the new bill contain against most forms of invidious discrimination.

96. This already happens although many of the selection proceedings are unfathomable.

97. (1983) 67 F.C.R. 449 at p. 455. See also *Minister for Immigration and Ethnic Affairs* v. *Tagle* (1983) 67 F.L.R. 164 and *Minister for Immigration and Ethnic Affairs* v. *Pochi* (1980) 44 F.L.R. 41.

98. Perhaps more because of the Charter and section 3 of the *Immigration Act 1976*. As a minimum, Canada should avoid any hint of *refoulement*.

99. For a general review of our refugee law it is useful, despite the passage of time, to read Wydrzynski, "Refugees and Immigration Act" *McGill Law Journal* 25/154 (1979) p. 154.

Canada's Refugee Crisis: Planned Mismanagement?

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I want to try to put into context what is happening at present in Canada in the light of what has happened over the last couple of years because I am one of the people who believes in the conspiracy theory. I believe that there was deliberate mismanagement by the immigration department and that this fostered a racist and xenophobic response from the Canadian public. In this paper, I shall point out a few facts that I think are conclusive in showing that there has been mismanagement.

The determination system that was put in place in 1976 (and came into effect in 1978) has never been a perfect system. However, it was not overloaded with cases when, in April and May 1984, the *Singh* case was argued before the Supreme Court of Canada. For the two days that it was argued, every senior official of the Immigration Commission was present in court. It was apparent, from listening to the arguments and questions that the Court put to the Department of Justice lawyer acting on behalf of the Crown, that the Commission had a very good chance of losing that case. A loss by the Commission would mean a crisis in terms of refugee determination in Canada because of the number of cases that would then require an oral hearing. The Supreme Court came out with their decision on April 4, 1985.

Although officials knew for a year that the Commission might lose and were aware of the crisis that would result, there was no legislative response in the wake of the Supreme Court decision. Instead, during the year the Court was deciding, there was a freezing of cases at the Federal Court. People were being advised (as they are being advised today again) that if they did abuse the process when they were not refugees, they would probably become landed; if they did not abuse the process, they would be deported. The government knew this happened, but did nothing to stop it by introducing legislation that would discourage abuse and stop the number of claimants increasing. A lot of people that made claims during that period are now residents today; and, unfortunately, we are back in the same position.

In May 1986, the government still did not announce any specific changes to the legislation but announced a landing program for those who had abused the process (landing somewhere close to 20,000 people over the past year). They announced that they were going to make changes in the legislation but that did not happen. At the same time that they announced a landing program, they announced the B-1 List. Everyone who was a refugee claimant from a country on that list automatically got a Minister's Permit and was not put into the refugee determination stream. Again, the word that developed on the street was that, if they had landed people because there were 20,000 people making claims, they will have another landing program at some point in the future if we continue abusing the process. That is exactly what has happened. There are now more than 30,000 people who have made claims, many of whom do not have a case to make in terms of a refugee process. It is inevitable that these people will be landed because we cannot afford to put them through another refugee determination system; it will be cheaper to land them because their numbers are so great.

In 1987 legislation was finally announced in the House. It was the same kind of legislation that the Department of Employment and Immigration had proposed to the government back in 1982 and 1984 when the Liberals were still in power. The difference between 1987, with a Conservative government, and 1984, with the Liberal government, was that in 1984 there was not the crisis that the Europeans had had to justify the introduction of restrictive legislation in Europe. But by 1987, there was. The Immigration Commission, by becoming incapable of managing the refugee determination system over a period of three years, had used its very mismanagement to justify its wish to close the doors to refugees. They were helped by the fact that a Sikh boat and a Tamil boat arrived. They took advantage of these events by not reacting in a responsible manner, particularly with the Sikhs. Instead, they led people to believe the Sikhs were

dangerous security threats and terrorists. Thus, they pandered to public xenophobic reaction and produced a rise of racism. What the Immigration Commission has done over the last few years in Canada is to create the conditions that have existed in Europe, in order to justify the implementation of a system that is the same as those that exist in some countries in Europe. We measure ourselves by the Europeans, not by African countries such as Sudan, not by countries that are overloaded with refugees, that have no kind of income.

The other factors that lead me to conclude there is deliberate mismanagement is to note the situation of the Portuguese, the Turks and the Brazilians in light of the treatment of the Guatemalans. In one year, 400 Guatemalans made refugee claims in Canada and 75 per cent of them were recognized as refugees. As a result, visas were introduced to control the flow of refugees into Canada from Guatemala. The government did not hide its purpose. In the case of the Portuguese, the government did not respond until there were 3,000 claimants, until it was publicly known across the country that Portuguese claimants were abusing the process. Only then did they impose visa controls. They used the Portuguese case to justify closing the door to people who abuse the process, yet it was the government that let that situation develop. The only conclusion that can be drawn from past history is that the Canadian public has been manipulated very successfully into accepting the government response and, in fact, favouring and pressuring the government to close the doors to real refugees.

I want to look now at the two bills within the context of the Constitution in Canada. Julius Grey has commented on this and Dan Heap has observed that these bills show a complete disregard for the constitutional rights that we have obtained through progressive development of law in Canada. Bill C-84 allows for the arbitrary detention of persons who are undocumented and persons who are considered to be a security threat when they arrive at a border. That detention will be automatic and arbitrary, without review, for up to 28 days for persons who do not have passports or visas and for persons that an immigration officer thinks may be a security threat. We can expect, under Bill C-84, that every single Sikh claimant will be detained initially on a suspicion that he or she may be a security risk by virtue of his or her nationality or religious beliefs. We may also expect that Chileans will be detained as a matter of course because they also seem to be a group of concern to the government. Our Charter of Rights and Freedoms guarantees that people cannot be detained arbitrarily without review, without having a right to go to court to seek habeus corpus, which is a common law tradition. This bill will take away that right.

Persons who are thought to be a security risk will be detained longer than 28 days. They will be put into a security review procedure and will go before a single Federal Court judge. This system is procedurally the same as the military tribunal system of justice found in Chile. There also the case is presented to a judge who summarizes it; then the individual concerned is allowed to respond without having heard any of the witnesses or any of the actual evidence being given against him. Federal Court judges, it is worth noting, have little expertise in security matters. Once a person is found to be a security risk, if the minister certifies him without a review, then he will be brought back to the inquiry and deported; he will not be allowed to make a refugee claim. Yet, the cases we have seen where there has been a concern about security have involved people who clearly have a well-founded fear of persecution in their country. The kind of evidence that the government uses to determine whether a person is a security risk is evidence obtained from that person's country.

The other persons excluded are those with criminal convictions. They are certified to be a danger to the public, and the certification is not reviewable. The exclusion of these persons from the refugee determination process, I think, is clearly open to challenge under the Charter. Section 7 of the Charter states that everyone has a right to life, liberty and security of the person, and that they cannot be denied that right except in accordance with the principles of fundamental justice. The *Singh* case established before the Supreme Court that the Charter applied to everyone, regardless of their status in Canada. If they are at a port of entry or a border post, they are covered by the Charter. The *Singh* case also established that where a person's life, liberty or security of the person is threatened by removal from Canada, that person has a right to be treated according to the principles of fundamental justice. Now, for those excluded because of criminal convictions, there is no fundamental justice with respect to the issue of their life, liberty and security of the person on removal from Canada. The issue is simply whether they have a criminal conviction; if so, the Minister will certify that they are a danger to the public—a step that is not reviewable or challengeable. There is no hearing on the merits of the case, in terms of the consequences to the person upon removal from Canada to their home country, and that is a clear violation of the Charter.

The second part of the system, contained in Bill C-55, also completely violates Section 7 of the Charter. In terms of the 'safe country' issue (before the House of Commons dealt with that on Third Reading) the adjudicator and the Refugee Board member had to ascertain whether the claimant would be allowed to return to a country that is safe or whether they would have a right to make a claim in that country. This procedure was altered by amendments in

the Commons, and what is left now are only the questions of what country they came from and whether they made an interconnecting flight in that country. The issues of whether they are allowed to return or whether they can make a claim in the country to which they are going are not issues that either the adjudicator or the Refugee Board member can consider. What the government did in the House of Commons was to open up the doors to a Charter challenge on the safe country issue. Again, it comes down to a question, in light of the *Singh* decision, of the consequences to that person of removal from Canada. Is life, liberty or security of the person being threatened by sending a Central American back to the United States, by sending a Tamil back to Sri Lanka? Those are clear and cogent issues, but the very fact that they have cut out any kind of determination based on these issues raises the question of whether the principles of fundamental justice are being applied.

The credible basis screen will be an adversarial hearing. It will also be a full hearing, because any lawyers worth their weight will present the full case to ensure that their clients receive the protection they need in being able to go on to another hearing. Thus, what the Department has done is to set up another inefficient system. There will be two hearings: one on credible basis and one before the Board. In terms of the review process, it is ironic that we are defending the right to go to the Federal Court when, as lawyers, we do not particularly like going to that court, and we are defending the right of adjudicators to review detention when we know that it is not a fair process in the first place.

Finally, let me mention what the consequences of this legislation will be. First, we will put refugees in orbit, in spite of what the Department says about trusting them or what Jim Hawkes says about multilateral agreements. Second, our system will result in the *refoulement* of some refugees. Third, this proposed system is going to break down because of Charter challenges based on unfairness and the lack of access to the determination system. We are hoping that we will be able to obtain injunctions based on Charter rights being argued before the Court; but, as a consequence, the system will freeze and will be tied up in the courts the way it was when the *Singh* case was being decided by the Supreme Court of Canada. We will have another crisis on our hands, and that will open the door, I believe, to the use of the Charter's 'notwithstanding' clause, by which the government will seek to exempt refugee legislation from the Charter completely. The fourth consequence is that the emphasis will be on selection overseas, and I want to make a point about this. We select refugees from overseas but we select them in a racist and sexist manner. Our regulations are geared toward men; women in the Third World do not have the educational qualifications that men have and

they cannot meet the selection criteria. Moreover, a consideration of the history of who comes from where shows that our government has favoured the kinds of refugees that it likes, not the kinds of refugees that are most in need. This is the system that is being developed – one that allows our bureaucrats to choose the kind of people they want in Canada.

Discussion

The final discussion period of the conference provided opportunities for commentators not only to raise specific questions about issues covered by the last session but also to comment on the conference as a whole.

Thus, Julius Grey and Barbara Jackman were asked to clarify the proposed hearings procedure laid down by Bill C-55. They responded by pointing out that the first hearing is to be in two parts. The first part, which can last only up to 72 hours, will be the 'screen' designed to discover whether the person has come from a safe country. In terms of this part of the determination process, that is the only issue of concern. The second part is the 'credible basis' hearing, an issue not as straightforward as people might think because the word 'credible' is completely subjective. It is the lawyer's task to do what is best for the interests of the client, and this must involve ensuring that a full case is presented at both parts of the first hearing. This must be done because, in order to demonstrate that the individual is a refugee, it will be necessary to establish a case so that he or she can come before the Refugee Board to prove refugee status. Because those who fail to establish their claim will not be admitted to Canada, it is crucial that a full case is presented at the first opportunity.

If the legislation is unconstitutional, then it is the lawyer's duty to challenge the system. These steps are all part of a lawyer's duty to

do the best for the client and are certainly not intended to drag out proceedings unnecessarily, to involve the taxpayer in large bills, or to establish a legal reputation. In fact, such moves are necessary to protect the claimant and guarantee the rights of all Canadians.

Speakers wondered whether a 'sanctuary movement' might develop in Canada because of public opposition to the proposed legislation. In response, it was noted that governments certainly are influenced by the knowledge that legislation will not be effective because of public opposition, and in a democracy there are bound to be those who are moved by a conscientious refusal to comply with the obligations placed upon them. However, it must also be recognized that evidence exists to show there are thousands of people who anonymously report their black neighbours (even those who are Canadian citizens and have been born here) in the hope that they have spotted an illegal immigrant. Thus, while there may be a portion of the population who will react with moral outrage against the proposed bills, there will also be a portion of the population that will react with extraordinary zeal and enthusiasm to uphold the legislation.

Others wondered whether a future government might implement significant modifications to the determination system and thus remedy the many problems that had been raised by speakers at the conference. However, it was argued that there were few grounds for optimism on this score. A change of government might stall the proposed bills for a year or so, but no longer. This is because a change of government would not change the senior planners of the legislation. They are part of the non-political public service and would remain in office. In fact, some speakers maintained that the only cause for optimism lies in the fact that Article 1 of the Charter of Rights and Freedoms could be interpreted to state that government action must not only be justified but also proportionate, and it could well be argued that Bills C-55 and C-84 are a disproportionate reaction to the problem.

Turning to overall observations on the conference, one participant suggested that the following points represent the main areas of conclusion:

- that the appropriate methodologies to be used in analyzing the issues surrounding the refugee problem include legal, sociological and historical approaches;
- that the phenomena relating to refugees form a sub-system of both international and national systems;
- that the refugee sub-system is the product of, and is influenced by, both international and national systems;

- that the ideological and cultural components and the interests of the recipient countries determine the common and individual sets of norms applicable to the refugee question;
- that the definition of 'refugee' and the scope of international action related to it call for a reconsideration of the term to include those who are 'refugees' within their own country or have a case as 'would-be refugees', as well as those currently defined as 'refugees';
- that the right of refuge is an obligation owed by all states;
- that the implementation of legislation relating to refugees should be through procedures based on the general principles of law recognized by civilized nations and should also prevent the possibility of abuse;
- that the root causes of the refugee phenomenon must be treated; and
- that a further international conference, involving representatives of refugees themselves, be organized to focus on the specific issue of fair hearing.

Speakers also suggested that several challenges for immediate international action exist. Since states are unlikely to surrender their sovereignty and control of their borders in the near future, the urgent issues are not questions of procedure or principles. Rather, the critical problem is that of refugee numbers. To this end, it is essential that the root causes of refugee movements be addressed and that international co-operation concerning situations in the countries of origin is mobilized. Neither will be easy, it was argued, but in the final analysis there is no alternative, because the problem of refugee numbers will not vanish.

Turning to Canada, it was observed that because of its background and characteristics, humanitarianism would ultimately prevail with respect to refugee determination. Indeed, it was argued that Canada's refugee policies compare very favourably with those of Western Europe and many other countries in the world. The challenges for Canada are four-fold: to become adjusted to the revolutions in transportation and communications that make it increasingly a country of first refuge; to balance what is politically possible with what is desirable from a humanitarian point of view; to realize that it is not a question of generosity but of political necessity to extend help to refugees; and, finally, to provide leadership in an international community that has increasingly become a vacuum, lacking any responsible solutions to the plight of refugees. Canada is one of the few countries that still has a legitimate claim to moral

leadership. It is the hope of those that seek such leadership that Canada will not fail.

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Human Rights and the Protection of Refugees under International Law

Edited by
Alan E. Nash

Rapporteur
John P. Humphrey

The recent controversy surrounding the admission of refugees to Canada is not an isolated event: across Western Europe, the United States and parts of Asia, restrictive measures have been introduced to control the entry of refugees. This flurry of legislative activity highlights the fact that the problems posed by refugees are very different from those that existed in 1951 when the International Convention Relating to the Status of Refugees was adopted. It is to this new situation that the international community and individual governments have responded; the extent to which their responses have been appropriate is widely debated.

Leading authorities on refugee issues from both sides of the Atlantic and Canadian policy makers discussed these problems at a conference entitled "Human Rights and the Protection of Refugees under International Law" held in late 1987 in Montreal and organized by the Canadian Human Rights Foundation.

Debate at the Conference showed that the issues are complex and wide-ranging. The papers presented by participants, reproduced in this volume along with summaries of conference deliberations, dealt with five themes: the nature and causes of the refugee problem; the international response; the limitations of the existing protection system; possible means of prevention and solutions; and the specific problems of the Canadian experience. A rapporteur's introduction, developing these themes, is provided by John P. Humphrey, who participated in the first drafting of the 1948 Universal Declaration of Human Rights and was Executive Secretary of the Conference that drafted the [illegible] Convention.

[illegible] Alan E. Nash is a research associate at the [illegible] Refugee Policy Program at the Institute for Research on Public Policy.

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